Petition

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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

MABEL DUNCAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

1. Whether the United States is answerable in money damages in respect of injuries allegedly suffered by members of an Indian Tribe because their Rancheria was terminated without compliance with statutory procedures, conduct asserted to constitute a breach of trust.

2. Whether, if the United States is held answerable in money damages for such conduct, damages may be awarded for alleged injuries not proximately caused by the statutory violation and breach of trust alleged.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, 1a-32a) is reported at 667 F.2d 36. An earlier opinion of the Court of Claims in this case (App. B, *infra*, 33a-54a) is reported at 597 F.2d 1337. The opinion of the District Court in related litigation, *Duncan* v. *Andrus*, Nos. C-71-1572 WWS and C-71-1713 WWS (N.D. Cal. Mar 21, 1977) (App. C, *infra*, 55a-68a), is unreported.

JURISDICTION

The decision of the Court of Claims was filed on December 2, 1981. On February 25, 1982, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATUTES INVOLVED

Section 3 of the Act of Aug. 18, 1958, Pub. L. No. 85-671, 72 Stat. 619-620 (the Rancheria Act) as originally enacted, provided in pertinent part:

> Before making the conveyances authorized by this Act on any rancheria or reservation, the Secretary of the Interior is directed:
>
> * * * * *
>
> (c) [T]o install or rehabilitate such irrigation or domestic water systems as he and the Indians affected agree, within a reasonable time, should be completed by the United States.

Section 3 of the Rancheria Act, as amended by the Act of Aug. 11, 1964, Pub. L. No. 88-419, 78 Stat. 390, provides in relevant part:

> Before making the conveyances authorized by this Act on any rancheria or reservation, the Secretary of the Interior is directed:
>
> * * * * *
>
> (c) To construct, improve, install, extend, or otherwise provide, by contract or otherwise, sanitation facilities (including domestic and community water supplies and facilities, drainage facilities, and sewage-waste-disposal facilities, together with necessary appurtenances and fixtures) and irrigation facilities for Indian homes, communities, and lands, as he and the Indians agree, with-

in a reasonable time, should be completed by the United States: * * *.

STATEMENT

1. Respondents are individual East Lake Band Pomo Indians of the Robinson Rancheria seeking to recover damages for injuries allegedly suffered in the wake of the termination of the reservation status of the Rancheria and their own special legal status as Indians. Respondents contend that the reservation status of the Rancheria was terminated without compliance with the requirements of Section 3 of the Act of Aug. 18, 1958, Pub. L. No. 85-671, 72 Stat. 619-620, as amended by the Act of Aug. 11, 1964, Pub. L. No. 88-419, 78 Stat. 390 (the "Rancheria Act").

The Robinson Rancheria is one of several small Indian reservation communities established by the Secretary of the Interior in California in the early years of this century. The Rancheria property was purchased by the United States in 1909 under the authority of the Indian Department Appropriations Act of June 21, 1906, ch. 3504, 34 Stat. 325, 333, and the Appropriations Act of Apr. 30, 1908, ch. 153, 35 Stat. 70, 76. The deed of transfer to the United States did not mention the purpose of the acquisition, or subject the lands to a trust, but the lands were assigned by the Secretary to the East Lake Band of Pomos for their use. In addition to the Robinson Rancheria proper, the East Lake Band of Pomos obtained an interest in a nearby tract generally known as "the Woodlot," which was set aside by the Secretary out of the public domain in 1907.

In 1958, Congress enacted the Rancheria Act for the purpose of terminating the reservation status of the rancherias and the Indian status of their resi-

dents. Under Section 2 of the Act, 72 Stat. 619, the lands and assets of 41 California rancherias and reservations, including the Robinson Rancheria, were to be distributed in unrestricted fee to the Indians residing thereon, pursuant to a plan to be agreed upon by the Secretary and the distributees. After distribution, the lands were to become subject to all state and federal taxes, and the distributees and their dependents were to lose their special legal status as Indians. *Ibid.* In addition, any tribal constitution or charter formerly approved by the Secretary was to be terminated. Section 11 of the Act, 72 Stat. 621.

Before the rancheria property was conveyed to the distributees under the Act, the Secretary was required to complete certain tasks. These included the responsibility

> to install or rehabilitate such irrigation or domestic water systems as he and the Indians affected agree, within a reasonable time, should be completed by the United States.

Section 3(c) of the Act, 72 Stat. 620.

A distribution plan for the Robinson Rancheria was developed by the Secretary and, on February 25, 1960, received the necessary approval of the 28 individual distributees. The only "agreement" relating to water supply made by the Secretary with the East Lake Pomos was a statement in the approved distribution plan that (App. A, *infra*, 5a-6a):

> The Indians of Robinson Rancheria request that the Bureau of Indian Affairs undertake the following actions: * * * (2) Provide water for any residence under construction that is as much as fifty percent completed within a ninety-day

> period after acceptance of this plan by a majority of the adult Indian distributees * * *.[1]

Deeds to the distributees were recorded and delivered in 1962.[2] Thereafter, the lands conveyed to the distributees became subject to the local real property tax.

Before public notice was given terminating the reservation status of the Rancheria, the Rancheria Act was amended by the Act of Aug. 11, 1964, Pub. L. No. 88-419, 78 Stat. 390.[3] Section 3(c) of the Act, as amended, added sewage facilities to the class of improvements the Secretary was authorized to provide prior to termination. As with the 1958 Act, however, the amended Section 3(c) did not expressly require that any particular services be provided. Instead, the Act directed the provision of those services agreed upon by the Secretary and the distributees of the Rancheria.

The Secretary and respondents made no further agreements regarding water or sewer services after enactment of the 1964 amendments to the Rancheria Act. A termination proclamation for the Robinson Rancheria and the distributees was published on September 3, 1965. 30 Fed. Reg. 11330.

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[1] The record does not indicate whether any new homes attained 50% completion during this period, nor is there anything to suggest that the Secretary failed in any way to comply with this arrangement.

[2] A nonprofit Robinson Pomo Association was created to take title to certain communal assets of the East Lake Band, including the Woodlot. Title thereto was conveyed in 1963.

[3] The proclamation terminating the reservation status of the Rancheria was delayed to preserve the eligibility of the distributees for the construction of sewage facilities under the Act of July 31, 1959, Pub. L. No. 86-121, 73 Stat. 267, 42 U.S.C. 2004a(a) (authorizing Surgeon General to construct sewage facilities on Indian lands).

2. On August 19, 1971, respondents filed an action in federal district court seeking declaratory and injunctive relief against the Secretary of the Interior, contending that the termination of the Robinson Rancheria had been carried out in violation of the terms of the Rancheria Act and was therefore void. *Duncan* v. *Andrus*, Nos. C-71-1572 WWS, C-71-1713 WWS (N.D. Cal.). Respondents also sought money damages for the allegedly wrongful termination. The damage claims were amended in late 1974 to demand an amount in excess of $10,000, and the district court granted respondents' motion to transfer the damage claims to the Court of Claims pursuant to 28 U.S.C. 1406(c).

By agreement of the parties, litigation in the Court of Claims was held in abeyance while the proceedings in the district court were concluded. The district court found that, as of the date of termination, the Rancheria water supply was inadequate in quantity for irrigation of home gardens and was unsatisfactory in quality for domestic use. The court also found that the inadequate water supply had created problems in sewage disposal. The court held that, because adequate water facilities had not been provided, the termination was unauthorized under the Rancheria Act (App. C, *infra*, 63a-66a).[4] The court ordered that the

[4] In the district court, respondents argued that the Rancheria Act imposed an absolute duty upon the Secretary to provide an adequate water supply to the distributees before conveying the land to them, and that the Robinson Rancheria termination was therefore unauthorized and voidable. The government acquiesced in this interpretation of the Rancheria Act and acknowledged that it had some fiduciary duty to the East Lake Pomos, at least until the date of the termination. The government further agreed that the termination should be set aside.

notice of termination of the Robinson Rancheria be rescinded, that all federal Indian benefits be restored to the distributees, and that each distributee who still held title to the property from the United States be allowed to reconvey the property to the United States to be held for his use (App. C, *infra*, 66a-68a).[5] No appeal was taken from the judgment of the district court.

3. Respondents then pursued their claims for damages in the Court of Claims. Respondents sought $100,000 in damages for each individual claimant for injuries allegedly resulting from the government's failure to provide an adequate water supply and from the termination itself. Damages were claimed for, *inter alia*, subjection to state and local real property taxes, loss of eligibility for various federal services provided to Indians, impairment of the Pomo culture, and emotional and physical injuries (App. A, *infra*, 21a). Claimants also sought $10,000 damages each for injuries incident to deprivation of an adequate sanitation system (*id.* at 22a). Finally, respondents prayed for $5,000 for each claimant as compensation for injuries allegedly suffered in consequence of the Secretary's failure to reserve to each individual a right of way easement to the community Woodlot (*ibid.*).

Respondents sought partial summary judgment on liability, claiming that the termination constituted a breach of trust for which the government was required to respond in damages. Alternatively, respondents alleged that the distribution agreement was a

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[5] The titles of third-party purchasers of distributed lands were not affected by the judgment of the district court. The court suggested that distributees who had sold such property might pursue a damage remedy in the Court of Claims (App. C, *infra*, 67a).

contract that the government had breached. The government moved to dismiss respondent's claims for want of jurisdiction, arguing that there was no statutory consent to suit, and that the respondents' claims were barred by the six-year statute of limitations, 28 U.S.C. 2501. The Court of Claims granted the respondents' motion for summary judgment and denied the government's motion to dismiss. *Duncan* v. *United States*, 597 F.2d 1337 (1979) (*Duncan I*) (App. B, *infra*, 33a-54a).

The court held that the findings of the district court in *Duncan* v. *Andrus* were binding on the question whether the requirements of the Rancheria Act had been complied with prior to termination (App. B, *infra*, 44a). The court concluded that the government had consented to suits in money damages for violation of the Rancheria Act, reasoning that whenever a trust relationship is established by statute, the statute " 'fairly mandate[s] compensation' " for its violation and thus authorizes suit in the Court of Claims (App. B, *infra*, 39a). In so holding, the Court of Claims relied on its decision in *Mitchell* v. *United States*, 591 F.2d 1300 (1979), [rev'd, 445 U.S. 535 (1980)], holding the United States liable in money damage for "breach of trust" in the management of lands allotted to individual Indians under the General Allotment Act, 25 U.S.C. 331 *et seq.* (App. B, *infra*, 39a-40a.)

In determining that a trust relationship existed between the United States and the East Lake Pomos of the Robinson Rancheria, the court emphasized that a trust need not be established expressly by the statute under which the suit is brought (App. B, *infra*, 41a). The court relied in this case on the language and history of the 1906 and 1908 Appropriations Acts indicating that the Rancherias were intended to be

used by the California Indians in the manner of a reservation (*id* at 40a-41a). The court also cited portions of the Agreed Statement of Facts submitted to the district court in *Duncan* v. *Andrus* which evidenced the Secretary's belief that a trust relationship had existed prior to termination (*id.* at 41a-42a). Finally, the court observed that Section 9 of the Rancheria Act makes reference to the "termination of the Federal trust," 72 Stat. 621, and thus indicates that a trust had in fact existed prior to termination (App. B, *infra*, 43a).

The court also held that the trust duty inferred from the above-mentioned sources had been breached by the government (App. B, *infra*, 44a-46a). The court concluded that the statute absolutely required the Secretary to provide an adequate water supply, and that the Secretary had breached his fiduciary duty in failing to do so.[6]

In granting the motion for summary judgment, the Court of Claims, acting sua sponte, also ruled on some of the particular damage claims, and proffered guidance as to the handling of other claims upon remand (App. B, *infra*, 46a-53a). The court held that Congress had not consented to suit for the full range of damages that might arguably be traced to a breach of trust. Rather, in the court's view, damages recoverable for breach of trust were limited to "tangible, direct inquiries to property or to direct losses due to denials of required services" (*id* at 48a). The court

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[6] The government did not deny that services authorized by Section 3(c) of the Rancheria Act had not been provided. Instead, the government argued that the statute afforded the Secretary discretion in providing services and that his actions were a reasonable exercise of that discretion and not a breach of trust.

accordingly stated that respondents could not recover damages for emotional and cultural harm (*id.* at 51a-52a, 53a). On the other hand, the court concluded that respondents were entitled to recover as damages all amounts paid in local property taxes during the period of improper termination, and the value of all land forfeited in tax sales (*id.* at 50a-51a, 52a n.14, 53a). In addition, respondents were to receive the value of all Indian services, including water and sanitary facilities, withheld during termination (*id.* at 51a, 53a) as well as damages for the government's failure to provide a right-of-way to the Woodlot (*id.* at 53a). The amount of those damages was left for determination upon remand.[7]

4. The United States sought this Court's review of the Court of Claims' *Duncan I* decision.[8] After deciding *United States* v. *Mitchell*, 445 U.S. 535, rev'g 591 F.2d 1300 (Ct. Cl. 1979), this Court granted our petition, vacated the Court of Claims' judgment, and remanded the case for consideration in light of the *Mitchell* decision. *United States* v. *Duncan*, 446 U.S. 903 (1980).

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[7] The court also rejected the government's contention that the respondents' claims were time-barred under 28 U.S.C. 2501 because filed more than six years after termination of the Rancheria. The court concluded that the claims were timely filed in the district court and noted that the transfer statute (28 U.S.C. 1406(c)) provides that a transferred case is to proceed "as if it had been filed in the Court of Claims on the date it was filed in the district court" (App. B, *infra*, 53a-54a).

[8] Our petition presented both the question whether statutory authority exists for recovery of damages *vel non* and the question whether, if damages are recoverable, they may include compensation for injuries not caused by the statutory violation and breach of trust identified.

5. Following the analysis employed upon remand in *Mitchell* v. *United States*, 664 F.2d 265 (1981) (*"Mitchell II"*),[9] the Court of Claims here essentially adhered to its prior decision in this case.[10] The court concluded that the government had breached a fiduciary duty by its conduct in effectuating the termination of the Robinson Rancheria, and that money damages are available to respondents as compensation for a wide range of injuries allegedly suffered in the aftermath of that termination.

The Court of Claims started with the premise, extracted from its *Mitchell II* decision that (App. A, *infra*, 8a):

> if a statute creates or recognizes the United States as general trustee of Indian property, that legislation ordinarily founds a substantive monetary claim for breach of that trust * * *.

The Court next concluded (*id.* at 9a-13a) that the United States held the Robinson Rancheria in trust for respondents. Support for this conclusion was adduced, first, from the appropriations acts authorizing purchase of the Robinson tract. Although the statutes made no mention of an intention to impose a trust, the court thought it clear that Congress in-

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[9] A petition for a writ of certiorari to review the Court of Claims' *Mitchell II* decision is being filed simultaneously with this petition. Copies of our petition in *Mitchell II* are being provided to respondents.

[10] The court explained (App. A, *infra*, 8a):

> The pith of it is that the Supreme Court's *Mitchell* decision, which dealt with a quite different statute and set of facts, bears only indirectly on the present case, and to the extent it has an impact we believe we have properly taken it into account in our *Mitchell II* ruling and in this opinion.

tended that the lands be held as a reservation, and inferred that the lands were intended to be held in trust (*id.* at 10a-11a). Second, the court noticed the Agreed Statement of Facts, entered in the district court proceedings, in which the Secretary acknowledged that, prior to termination, he had "recognized a federal trust relationship with the Robinson or East Lake Band, as a distinct Indian tribe or band of Indians" and that "it was always understood by the Interior Department—after the purchase of the [Robinson] Rancheria—that it was being held by the United States for the use of the East Lake or Robinson [Band of] Pomo Indians" (*id.* at 11a-13a & n.7). Finally, the court pointed to language in the 1958 Rancheria Act alluding to the termination of the "federal trust relationship" (*id.* at 12a-13a).[11]

The Court of Claims reasoned (App. A, *infra*, 13a-14a) that unlike the General Allotment Act trust considered in *Mitchell I*, the trust affecting the Robinson Rancheria was "general and unlimited." The court explained (*id.* at 13a) that because of the "long and established history * * * of government fiduciary obligation in the case of management of Indian property" it was not necessary for Congress to "spell out specifically all the trust duties of the Government as trustee." On the contrary, absent evidence of a more limited congressional purpose, the court thought it was to be assumed that the trust encompassed the full range of duties borne by a private trustee. In any event, the court noted, the Rancheria Act does impose specific obligations upon the Secretary, including the provision, prior to termination, of adequate water and sewer facilities.

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[11] In addition, the court stated (App. A, *infra*, 9a) that it was bound by a finding entered in the district court proceedings that the Rancheria was held in trust.

The court concluded that the "general trust relationship as to the property of the Robinson Rancheria grounds compensation for breach of that trust" (App. A, *infra*, 14a), finding nothing in the relevant statutes or circumstances sufficient to overcome the presumption—extracted from *Mitchell II*—that a damages remedy is available for breach of a trust duty owed to Indians. The court reasoned that a damages remedy was required because the Rancheria Act evidences Congress' intention that, prior to termination, "the Indians * * * obtain the proper economic and financial benefits" (*id.* at 15a), and because injunctive or declaratory relief would provide no relief from injuries allegedly incurred during the period of wrongful termination (*id.* at 16a-17a).

The government's trust, moreover, had been breached, the court held (App. A, *infra*, 18a-20a), because the Secretary did not provide adequate water and sewer systems prior to termination.[12] The court observed that the government had conceded that it had violated its statutory obligations to provide water and sewer systems and that, in the injunctive proceedings, the district court had made the same determination. The district court's further finding that the statutory violation was a breach of trust was held to bind the United States as a matter of res judi-

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[12] The court reserved the question whether the Secretary's failure to reserve each respondent an easement to the Woodlot was a breach of trust for determination upon remand to the Court's Trial Division (App. A, *infra*, 28a), but appears to have assumed that the United States had a fiduciary obligation in this regard, which, if breached, would support an award of damages.

cata. The Court of Claims indicated alternatively that it would reach the same conclusion were the matter res nova—rejecting the argument that the Secretary's action was within his discretion as a fiduciary even if contrary to the statute.

Finally, as it had in its initial decision, the Court of Claims canvassed the various categories of damages sought by respondents (App. A, *infra*, 21a-29a). The court held that damages would be recoverable for loss of the claimants' tax immunity during the period of termination and loss of land through tax sales—said to be injuries proximately caused by the breach of trust (*id.* at 25a, 28a n.24)—and that damages would also be recoverable for failure to reserve access to the Woodlot *if* that were determined to be a breach of trust (*id.* at 24a-25a, 28a). More speculative and amorphous damages claims, however, such as those predicated upon alleged injuries to the Pomo culture and psychological injury to the Indian claimants, were ruled out as beyond the scope of the trust and statutory basis for recovery of damages (*id.* at 24a, 26a-27a). The court left open the question whether damages were available for loss of Indian health and welfare entitlements during the period of wrongful termination—reasoning that such damages would be recoverable if, and only if, such damages would have been available to respondents in the absence of any termination (*id.* at 25a-26a). The court also left unsettled (*id.* at 27a-28a) the availability of damages for the sale of Rancheria lands by the Indians to non-Indians after termination, for costs incurred by reason of the application of California building codes on the Rancheria after termination, and for alleged physical injuries. The court stated that "the test should

always be that of proximate causation by a proven breach of trust" (*id.* at 28a-29a).[13]

The court thus granted respondents' motion for partial summary judgment, denied the government's motion to dismiss, and remanded the case to the trial division "for the determination of the nature and extent of damages in conformity" with the court's opinion (App. A, *infra*, 30a).[14] Judge Nichols reluctantly concurred (*id.* at 30a-32a) in the court's judgment, deeming himself bound by the court's en banc *Mitchell II* decision, from which he had dissented in material part.

REASONS FOR GRANTING THE PETITION

The decision below repeats and extends the errors of the Court of Claims' *Duncan I* decision, and more importantly, of its decision in *Mitchell II*. Read in

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[13] Respecting the claim for damages for subjection of respondents to California building codes, the court said (App. A, *infra*, 28a)

> if plaintiffs can demonstrate that the Government's unlawful termination exposed them to state regulations which directly and proximately increased the costs of building or maintaining homes on the Rancheria, then recovery should be allowed (but damages should not be awarded because state regulation was "inconsistent with an Indian way of life").

[14] Although the United States had not challenged the Court of Claims' ruling that respondents' claims were timely filed in our prior petition for a writ of certiorari, and did not pursue the statute of limitations defense upon remand, the Court reiterated (App. A, *infra*, 29a-30a) its rejection of that defense.

The court declined to reach, however, respondent's alternative theories of recovery based upon an alleged breach of the termination agreement, and an alleged "taking" (*id.* at 30a n.25).

conjunction with *Mitchell II*, the present ruling makes clear that the Court of Claims will almost invariably hold the United States accountable in damages for a statutory violation affecting the welfare of Indian claimants. As we explain in our petition in *Mitchell II*, these decisions represent a fundamental departure from the teaching of this Court, establishing that affirmative congressional authority is necessary to hold the United States answerable in money damages, and that the existence of a substantive statutory right, without more, is insufficient. See *United States* v. *Testan*, 424 U.S. 392, 398-405 (1976). Like *Mitchell II*, the present decision of the Court of Claims threatens to subject the United States to substantial liabilities without the necessary congressional authorization.

In addition, in specifying which categories of damages may be recovered, the Court of Claims, in *Duncan II*, as in *Duncan I*, disregarded ordinary principles of proximate causation that limit any monetary liability the government may have incurred. That aspect of the decision below, objectionable in itself, also compounds the court's threshold error of permitting recovery for an alleged breach of trust in the absence of proper congressional authorization.

1. It is familiar learning that a waiver of sovereign immunity " 'cannot be implied but must be unequivocally expressed.' " *United States* v. *Mitchell*, *supra*, 445 U.S. at 538; *United States* v. *Testan*, *supra*, 424 U.S. at 399, quoting *United States* v. *King*, 395 U.S. 1, 4 (1969). And the court has held that to waive sovereign immunity a statute must "in itself * * * fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " *United States* v. *Testan*, *supra*, 424 U.S.

at 401-402, quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967).[15]

The Court of Claims' decision rests upon application and extension of the erroneous logic employed in its *Mitchell II* decision. For the reasons sufficiently stated in our petition in *Mitchell II* (Pet. 13-15, 18-22) filed simultaneously herewith, that analysis is irreconcilable with the requirement that, as to any

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[15] Here, as in our petition in *Mitchell II*, we follow the terminology of this Court's *Testan* and *Mitchell* opinions by speaking of a failure to waive the bar of sovereign immunity. In *Testan* the court stated that the Tucker Act is merely "jurisdictional," intimating that it does not effect a waiver of sovereign immunity. 424 U.S. at 398, 400. And in *Mitchell* the court repeated that the respondents "must look beyond the jurisdictional statute [the Tucker Act] for a waiver of sovereign immunity with respect to their claims." 445 U.S. at 538. Technically, we think it more accurate to say that the Tucker Act itself effects a conditional waiver of the otherwise absolute immunity of the United States from being sued eo nomine. See, *e.g.*, *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). The waiver is effective whenever an independent basis for recovery of damages exists, be it a contract, the government's retention of funds owned by the claimant (see *United States* v. *Testan*, *supra*, 424 U.S. at 400) or another statute that creates a right of action in damages against the United States for breach of a statutory command (*ibid.*). But it cannot matter how the point is articulated. It is entirely clear that no recovery can be had under the Tucker Act in respect of a claim founded upon an Act of Congress unless the statute invoked, construed in the conservative manner appropriate to a waiver of sovereign immunity (see *United States* v. *Sherwood*, *supra*, 312 U.S. at 590-591) can be said to make the United States answerable in damages for the conduct of federal officials in violation of the particular statute. *United States* v. *Testan*, *supra*, 424 U.S. at 400. It goes without saying that the semantic reformulation we propose would not call in question the fundamental reasoning, much less the result, of *Testan*, this Court's earlier *Mitchell* decision, or any other of this Court's decisions.

claim for money damages against the United States founded upon a statute, the statute must, on its face or by strong and clear implication, convey congressional consent to the recovery of damages. In restating and applying the holding of *Mitchell II* here, the panel made plain the extraordinary sweep of that doctrine, suggesting that whenever "a statute creates or recognizes the United States as a general trustee of Indian property that legislation founds a substantive monetary claim for breach of that trust * * *" (App. A, *infra*, 8a).

a. Turning, as *Testan* requires, to the statute itself upon which respondents' claims are premised—the Rancheria Act—we find nothing that can " 'fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " *Testan*, *supra*, 424 U.S. at 401-402 (citation omitted). Rather, both before and after amendments enacted in 1964, Section 3(c) of the Rancheria Act, at most imposed a substantive duty upon the Secretary of the Interior to provide some appropriate level of water and sanitary services for the Robinson Rancheria prior to termination (see page 21 & n.17, *infra*).[16] Like the duty, imposed by the Classification Act of 1949, 5 U.S.C. 5101(1)(A), to apply "the principle of equal pay for substantially equal work" considered in *Testan* (424 U.S. at 399-405), this provision merely creates a substantive right, enforceable through declaratory or injunctive relief, but does not support an award of money damages.

Contrary to the Court of Claims' suggestion (App. A, *infra*, 16a-17a), there is nothing about the duties

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[16] We note that the court did not identify any statutory basis for holding, as it appears to have done (see note 12, *supra*), that the United States had a trust duty to exercise proper care regarding the preservation of access to the Woodlot.

imposed by the Rancheria Act that requires the availability of damages or renders injunctive and declaratory relief inadequate. Indeed, in this case, respondents have secured injunctive relief and the Secretary has agreed to accept the Robinson Rancheria back into reservation status. Thus, the only wrongful act identified to date by either the district court or the Court of Claims—the Secretary's termination of the Robinson Rancheria and the East Lake Pomos without first providing an adequate water and sewer system—has been undone. To be sure, the injunctive remedy may be less than ideal when relief is tardily granted, but that circumstance is due in part to respondent's delay in initiation of the district court proceedings; plainly, their right of action accrued immediately upon the termination of the rancheria without compliance with the statute, if not earlier. Moreover, the Court of Claims' conclusion that substantial injuries would go unredressed in the absence of monetary relief, depends largely upon its erroneous view that damages not proximately traceable to the Secretary's adjudicated noncompliance with Section 3(c) of the Rancheria Act are nonetheless recoverable from the United States (see pages 24-25, *infra*).

Rather than supporting an inference that damages are available against the United States for its failure to meet an objective standard defining an adequate level of water and sewer services, the language of Section 3(c) of the Rancheria Act points the other way. By enjoining the Secretary and the Indians to negotiate an agreement as to the facilities to be provided prior to termination, Congress provided a vehicle for enforcement of the Secretary's promises: a suit for damages for breach of contract that may be entertained by the Court of Claims. See 28 U.S.C. 1491; see *United States* v. *Testan*, *supra*, 424 U.S. at 400.

Thus, Section 3(c) may be fairly read as mandating compensation for the Secretary's failure to adhere to a termination agreement. Congress' failure, by contrast, to expressly mandate any particular level of services in the statute, much less to mandate payment of any sum of money, militates strongly against implication of a damages remedy for non-contractual disputes. 424 U.S. 402 (distinguishing *Selman* v. *United States*, 498 F.2d 1354 (Ct.Cl. 1974)).

The Court of Claims also rested its decision upon the view that the various provisions of the Rancheria Act were intended to achieve the overriding objective of economic self-sufficiency for the California Indians involved (App. A, *infra*, 14a-16a & n.13). With this general proposition we have no quarrel, but it is insufficient to overcome the "presumption" against the availability of a damages remedy against the United States. See *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927). Reference to a common theme that links the various provisions of the Rancheria Act simply does not supply the "affirmative statutory authority" (*United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513-514 (1940)) necessary to maintain an action for damages against the United States.

b. Although the Court of Claims' decision rests ultimately upon what the court characterized as "legislative creation of a general trust relationship as to the property of the Robinson Rancheria" (App. A, *infra*, 14a, 16a), the decision draws in part upon generalized notions of the special "trust" tenure in which the United States holds lands for Indian tribes, and the special relationship between the United States and Indians generally (App. A, *infra*, 9a-14a). Here, as in *Mitchell II* (Pet. 20), we hasten to acknowledge that the relationship between the

United States and the East Lake Pomos, like that extending to the Indian tribes generally, is a special one that may give rise to enforceable legal obligations supplementing the statutory provisions that govern the Secretary's relationship with the Indian tribes.[17]

Yet, as is also explained in our petition in *Mitchell II* (Pet. 20-22 & n.17) this fiduciary relationship has no bearing on the availability of damages as a remedy for a statutory violation.[18] In this respect Indians are not situated differently from any other claimant against the United States; the requirement of unequivocal congressional consent to suit is as strictly enforced against Indian claimants as others. See, *e.g.*, *Klamath Indians* v. *United States*, 296 U.S. 244, 250, 255 (1935); *Blackfeather* v. *United States*, 190 U.S. 368, 376 (1903). Thus, it does not follow that every statute that implements some aspect of

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[17] It is precisely for this reason that the government conceded in the district court and in the court below that it had not fulfilled its obligations under Section 3(c) of the Rancheria Act. Absent the fiduciary background, a fair argument could have been made that under the statute, failing prompt agreement between the Secretary and the affected Indians as to the facilities to be provided, the Secretary was released from all enforceable obligations.

Similarly, we do not challenge here the district court or Court of Claims' premises that the Secretary did not comply with Section 3(c), that the Secretary's relationship with respondents has a fiduciary character, or that his conduct may be deemed a breach of trust. We simply question the ultimate conclusion that these are sufficient to hold the United States accountable in damages.

[18] Significantly, as we observe in *Mitchell*, this Court has never held that the special guardian-ward relationship between the United States and the Indian tribes is sufficient to subject the United States to damages liability for breach of such duties.

the special relationship between Indians and the United States constitutes the "affirmative statutory authority" necessary to recover damages against the United States. *United States* v. *United States Fidelity & Guaranty Co.*, *supra*, 309 U.S. at 513-514. Rather, the question in every case must be whether the statute can fairly be interpreted as authorizing a damages remedy.

There is nothing in the indicia from which the Court of Claims inferred congressional intent to hold the Robinson Rancheria in trust (see App. A, *infra*, 9a-14a), that suffices to mandate the availability of a damages remedy. The 1906 and 1908 Appropriation Acts to which the Court of Claims pointed reflect only the intention that land be purchased "for the use of" landless California Indians; no express trust is created such as might strengthen the inference that a damages remedy—an incident of a private trust—was made available by Congress. Compare *United States* v. *Mitchell*, *supra*, 445 U.S. at 550 (White, J., dissenting). Reliance upon the Secretary's acknowledgment of the existence of a trust relationship is equally unavailable. This was no more than an expression of the general guardianship relationship between the United States and Indians and does not reflect congressional authorization for the recovery of damages. The same is true of Sections 3(e) and 9 of the Rancheria Act, cited by the Court, which employ the term "trust" simply to denote the special relationship between the United States and the California Indians. We have no doubt that these factors were properly considered by the district court in determining that the Secretary's termination of the Robinson Rancheria was unlawful; but it is equally plain that none of these factors, or all three taken in combination, is

sufficient to authorize maintenance of this damages action.

2. The Court of Claims' rulings on damages (App. A, *infra*, 21a-29a) do not cure the essential defect of its original rulings (App. B, *infra*, 46a-52a) on this subject. Thus, although on remand the court paid lip service to the limiting principle of proximate causation (App. A, *infra*, 25a, 28a-29a), the court actually continued to allow recovery of damages, such as those for loss of tax immunity, that were not proximately caused by the only statutory violation or breach of trust found by the court to have occurred: the Secretary's failure to provide, prior to termination, water and sanitation facilities required by the Rancheria Act. Assuming arguendo that damages are available to respondents, the award should be calculated simply to restore them to the position they would have enjoyed had there been no violation of the statute. Such damages are limited to any injury or loss directly caused by the absence of adequate water facilities.

The Court of Claims' mistaken belief that it had honored the principle of proximate causation flowed from its failure precisely to define the violation to be redressed. Thus, rather than focus upon the particular statutory violation identified, the court labeled the violation a "breach of trust," and inferred from that characterization that the termination itself was wrongful (App. A, *infra*, 25a). The court proceeded to analyze the damages claims by asking whether they were proximately caused by the "unlawful termination," rather than asking whether they were attributable to the actual wrong: failure to provide adequate water and sewer facilities. The expanded liabilities established by this shift in frame of reference are unwarranted, however, for the termination

itself was not a wrong; rather, under the Rancheria Act, Congress specifically dictated that the California Rancherias be terminated. Accordingly, the termination itself does not constitute actionable injury. So far as has been found to date, the termination of the Robinson Rancheria was defective only because of the Secretary's failure first to provide an adequate water and sewer system; it is only that default that is to be redressed by an award of damages.[19]

The Court of Claims, however, went far beyond allowing damages for the statutory violation. Damages for loss of tax immunity or for land lost in tax sales could not be recovered under the proper standard—for if the Secretary had complied with Section 3(c) the respondents would have lost their tax immunity anyway. Similarly, no damages can be awarded to compensate for respondents' loss of eligibility for health and welfare benefits available to federally recognized Indians—even if such damages would have been available to an unterminated Indian denied such benefits. Respondents' right to such benefits was severed by Congress in the Rancheria Act. Recovery should also have been precluded as to several other categories of damages left open by the Court of Claims: compensation for improvident sales of rancheria lands to non-Indians by individual respondents, and costs attributable to application of California building codes. These damages were not caused by the Secretary's statutory violation; they merely followed that action chronologically. In short,

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[19] There has never been, nor, it would seem, could there ever be, a showing that the respondents would have *refused* to agree to termination had the Secretary *complied* with his obligations under Section 3(c). Damages traceable to the termination itself, accordingly, were not proximately caused by the wrong identified.

the court's admonition, that "[t]he test should always be that of proximate causation by proven breach of trust" (App. A, *infra*, 28a-29a), was dishonored by the court in practice.

3. The decision of the Court of Claims continues the dramatic expansion of the government's liability in damages commenced by *Mitchell II*. As we have noted, the issues tendered here are intimately related to those presented by our petition in *Mitchell II*. Although the decision here rests upon *Mitchell II*, it represents a significant generalization of the rule applied in *Mitchell* and illustrates well the range of liabilities that might be fastened upon the United States. We accordingly suggest that plenary consideration of this case in tandem with *Mitchell II* would be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1982

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 10-75

(Decided December 2, 1981)

MABEL DUNCAN, ET AL.

v.

THE UNITED STATES

Before DAVIS, NICHOLS and KASHIWA, *Judges.*

ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO DISMISS

DAVIS, *Judge*, delivered the opinion of the court:

This is our second consideration of this Indian breach-of-trust case. In the previous decision (*Duncan* v. *United States*, 220 Ct. Cl. ——, 597 F.2d 1337 (1979)), we held that the court had cognizance of the claims under 28 U.S.C. § 1491, and that the plaintiffs had a right to recover on much (though not all) of their demands. On the Government's petition for certiorari, the Supreme Court vacated our judgment and remanded the case "for further consideration in light of *United States* v. *Mitchell*, 445 U.S. 535 (1980)." *United States* v. *Duncan*, 446 U.S. 903

(1980). On that remand, we received further briefs and had oral argument. We have reconsidered the case, not only in the light of the Supreme Court's *Mitchell* ruling, but also of our recent *en banc* decision in *Mitchell II*, *Mitchell* v. *United States*, Nos. 772-71 through 775-71, decided October 21, 1981 (likewise on remand from the Supreme Court). We adhere to our prior holding, with some modifications.

I

Background

Plaintiffs, Pomo Indians of the Robinson Rancheria in Northern California, have attacked the termination by the United States of their rancheria status in 1965. In the companion District Court case against the Secretary of the Interior (and other federal officials), *Duncan* v. *Andrus*, Nos. C-71-1572 and C-71-1713 (N.D. Cal. March 22, 1977), they obtained declaratory and injunctive relief grounded on that court's determination that the termination was unlawful. No appeal was taken from that decision. In the present suit (initially part of the District Court litigation but transferred here under 28 U.S.C. § 1406 (c)), claimants seek monetary recovery for damages resulting from the invalid termination. They have moved for partial summary judgment on liability, mainly urging that the 1965 termination was a breach of trust and rendered the Federal Government responsible for various pecuniary damages. Defendant has cross-moved to dismiss for lack of jurisdiction and because plaintiffs' claims are allegedly barred by the statute of limitation.

The facts on which we base this decision are presented in plaintiffs' uncontested affidavit and in the exhibits accompanying their motion for partial sum-

mary judgment. The primary exhibit is a detailed "Agreed Statement of Facts," filed by both sides (plaintiffs and the defendant Government officials) in the District Court case, *Duncan* v. *Andrus*, *supra*. This "Agreed Statement" was specifically adopted by the District Court. That court's opinion (which also contains its independent findings) is likewise a source of underlying predicates for our determination; under the principles of collateral estoppel there can be no relitigation of the issues determined in that related proceeding by the same plaintiffs against high federal officials (acting in their official capacity). *See, e.g., Edgar* v. *United States*, 145 Ct. Cl. 9, 171 F. Supp. 243 (1959); *McGinty* v. *United States*, 151 Ct. Cl. 399, 403 (1960), *cert. denied*, 368 U.S. 867 (1961); RESTATEMENT (SECOND) OF JUDGMENTS, § 80, Comment e at 22-23, Reporter's Note at 29 (Tent. Draft No. 2, 1975).[1]

Rancherias are numerous small Indian reservations or communities in California, the lands for which were purchased by the Government (with Congressional authorization) for Indian use from time to time in the early years of this century—a program triggered by an inquiry (in 1905-06) into the landless, homeless or penurious state of many California Indians. We are now concerned with the Robinson Rancheria (in Lake County California) which consists of the Rancheria proper and a nearby unin-

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[1] We have no reason to doubt the District Court's jurisdiction to grant affirmative and declaratory relief. Defendant, although characterizing or interpreting the facts in the Agreed Statement and the District Court's opinion somewhat differently from plaintiffs, does not basically contest those facts. In particular, the Government does not offer to prove that the facts were otherwise.

habited wood reserve, known as the "woodlot." The Rancheria land was purchased in 1909 under authorization contained in Indian appropriations acts of 1906 and 1908. The Rancheria was occupied by a California band of Pomo Indians and the land was informally assigned to families of that band.

After several investigations and much debate, Congress in 1958 passed an act providing for the termination of various rancherias and reservations, including the Robinson Rancheria, Pub. L. No. 85-671, 72 Stat. 619 (1958) (the "Rancheria Act"). This law provided for termination of the special status (as Indian lands) of various California rancherias upon approval by a majority of the affected Indians of a final distribution plan. Section 3 of the Act directed the Secretary to undertake various construction projects and improvements on the Indian land before conveying it under the distribution plan. Section 3(c), which founds most of the gravamen of plaintiffs' complaint, required the Secretary to, "install or rehabilitate such irrigation or domestic water systems as he and the Indians affected agree, within a reasonable time, should be completed by the United States." Rancheria Act, 72 Stat. 619, 620 (1958).[2] Under

[2] Section 3(c) was significantly modified by the 1964 amendments to the Rancheria Act. The amendments expanded the scope of the Secretary's responsibility to include sanitation facilities and delegated responsibility for sanitation facilities to the Department of Health, Education and Welfare. *See* Pub. L. No. 88-419, 78 Stat. 390 (1964). Even before the 1964 amendments (which were effective before termination of the Robinson Rancheria) it was clear that the Government had some responsibility to provide Indians with sanitation systems. Under a 1959 statute the Surgeon General was authorized to construct or improve sanitation facilities on Indian

the Act, termination of the Rancheria ended the rights of the Indians to receive special federal services *qua* Indians, and exposed Rancheria lands to state tax liability and regulations. Rancheria Act § 10(b), 72 Stat. 619, 621 *as amended by* Pub. L. No. 88-419, § (h), 78 Stat. 390, 391 (1964); *see* Rancheria Act § 2(d), 72 Stat. 619.

Pursuant to the Act, the Secretary of the Interior developed a distribution plan for the Robinson Rancheria which won majority approval in March 1960. The plan provided for distribution of Rancheria lands to 28 named Indians and for the woodlot and certain community property to be conveyed to an association of the Robinson band. Although distribution of Rancheria assets was completed in 1963, final termination was delayed by negotiations over construction of a sewage system. A final termination notice was published in the *Federal Register* on September 3, 1965. 30 Fed. Reg. 11,330-31 (1965).

Despite serious and well-known water shortages at the Rancheria (the water supply was not sufficient for reasonable domestic needs and was inadequate to irrigate domestic gardens or farm lands), the Secretary made no significant provision for the improvement of Rancheria water supplies prior to termination. The only agreement relating to additional water supplies was a statement in the distribution plan that:

> The Indians of Robinson Rancheria request that the Bureau of Indian Affairs undertake the following actions: * * * (2) Provide water for any residence under construction that is as much as

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lands. Pub. L. No. 86-121, § 1, 73 Stat. 267, *amending* Pub. L. No. 568, ch. 658, 68 Stat. 674 (1954) (codified at 42 U.S.C. § 2004a (1976)).

> fifty percent completed within a ninety-day period after accetpance of this plan by a majority of the adult Indian distributees, as provided in Section 2(b) of Public Law 85-671.

This statement does not guarantee an adequate year-round water supply, and the record does not indicate how many, if any, of the affected Indians had houses fifty percent complete within the requisite 3-month period.

Similarly, the existing Rancheria sanitation system was grossly inadequate. Most homes lacked any internal plumbing, and there was no water-carried waste system on the Rancheria. After learning of the 1959 statute authorizing the Surgeon General's office to construct water disposal systems on Indian lands, the Robinson band requested a sewage system. *See* Pub. L. No. 86-121, § 1, 73 Stat. 267 (codified at 42 U.S.C. § 2004a (1976)). The Public Health Service did install some septic tank and absorption field facilities pursuant to a 1964 agreement with the Indians, but some of the absorption fields proved inadequate and no adequate water-carried sewage system was ever provided.

After the initial distribution of Rancheria assets in 1961, Lake County imposed a real property tax on lands held by the Robinson band. This taxation continued until 1977, when the District Court found that the Robinson Rancheria had been unlawfully terminated. *Duncan* v. *Andrus*, *supra*. Nos. C-71-1572 & C-71-1713, memo op. at 11 (N.D. Cal. March 22, 1977).[3] That court granted various types

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[3] The District Court placed its decision primarily on the Government's failures with respect to the water and sanitation facilities. The judge also pointed out that "[t]he Indians of the Robinson Rancheria were not represented by counsel

of nonmonetary injunctive and declaratory relief, including (a) voiding of the termination insofar as it ended the plaintiffs' status as Indians and their eligibility for federal services and benefits provided to Indians by the United States, (b) retention by the plaintiffs (and all dependent members of their families) of their status as Indians under federal law, (c) continued application to the Indians of the Robinson Rancheria of all statutes of the United States which affect Indians because of their status as Indians, and (d) restoration of trust status to the land and assets of the Robinson Rancheria where possible.[4]

II

Bearing of Supreme Court's Mitchell Opinion

The Supreme Court's *Mitchell* opinion, which we were instructed to consider on remand, does not directly call for or suggest any change in our prior ruling. The holding of *Mitchell* is that, in view of its objectives and legislative history and background, the General Allotment Act, 25 U.S.C. §§ 331-358, did not create any fiduciary responsibility in the United States for management of allotted forest lands. 445 U.S. 542, 546.[5] The Court expressly left open the issue of whether a statute imposing on the Govern-

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in negotiating and approving the termination agreement" and suggested that the Government's procedure in dealing with those Indians with respect to the water systems was not fully fair.

[4] Bona fide purchasers (for value) from the Indians were not to be affected. *See* note 6, *infra*.

[5] The trust was held limited in purpose "to prevent alienation of the land and to ensure that allottees would be immune from state taxation." *See* 445 U.S. at 542, 542-44.

ment general fiduciary duties toward the Indians would constitute a waiver of sovereign immunity. 445 U.S. at 542. Here we have that very case. The plaintiffs have always urged (and we previously held) that Congress has created, in legislation other than the General Allotment Act, a general trust relationship toward them as Indians which enables them to sue in this court on money claims for breach of trust. *Mitchell* leaves them free to make that contention, and we are free to decide it.

Mitchell did, however, give overall guidance as to the interpretation and application of statutes said to waive federal immunity from suit. In *Mitchell II*, *supra*, we have taken account of, and tried to follow, that direction. *See* slip opinion, especially Parts II and III. In our reconsideration of the present case, we have applied the principles of *Mitchell II* as they are relevant here, in that way utilizing the general teachings of the Supreme Court's decision in *Mitchell*. The pith of it is that the Supreme Court's *Mitchell* decision, which dealt with a quite different statute and set of facts, bears only indirectly on the present case, and to the extent that it has an impact we believe we have properly taken it into account in our *Mitchell II* ruling and in this opinion.

III

Jurisdiction over Indian Breaches of Trust

Mitchell II rules that, if a statute creates or recognizes the United States as general trustee of Indian property, that legislation ordinarily founds a substantive monetary claim for breach of that trust, a claim which may be vindicated by the Indian beneficiaries through a suit for breach of that trust which may be brought in the Court of Claims under 28 U.S.C.

§ 1491 (and 28 U.S.C. § 1525). That *en banc* holding is, of course, binding on this panel. If, therefore, such a trust exists over plaintiffs' land and assets—covering claimants' current assertions of breach—this court has jurisdiction to entertain the suit. The remaining issues are: Did such a trust relationship, embracing the subject of the alleged breaches, exist between the United States and the Robinson Rancheria Indians? If so, was that trust breached? If breached, what type of damages can plaintiffs properly claim in this court? Finally, are plaintiffs' claims barred by limitations?

IV

The Trust Relationship Here—Nature and Consequences

A. In *Duncan* v. *Andrus*, *supra*, the District Court found that until the purported termination legal title to the land of the Robinson Rancheria remained in the United States, "although it was acknowledged that the United States held in trust for the California Indians." [6] Not only are we bound by that ruling under the doctrine of issue preclusion, but we agree with it and come to the same conclusion on our own. We do so on the basis of the context and language of the original appropriations acts authorizing purchase of the Robinson tract; the contemporaneous and con-

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[6] The court's decree held the Secretary of the Interior and his subordinates "under a continuing duty to restore trust status to the lands and assets of the Robinson Rancheria where possible." Some of the lands had been sold in good faith to non-Indians during the period of the unlawful termination (1965-1977) and restoration of trust status was not required as to such lands.

tinuing interpretation by the agency charged with supervision of the rancherias; and the wording of the 1958 Rancheria Act demonstrating a subsequent Congress's acknowledgment of the trust relationship.

The original appropriations acts which authorized purchase of the Robinson (and other) rancheria lands were passed in response to the Kelsey Report. At the request of the Indian Office Mr. Kelsey had surveyed the situation of California Indians and recommended that Congress appropriate monies to provide reservations for homeless Indians, and adequate water-supplied allotments for Indians holding desert allotments. *See Duncan* v. *Andrus*. Nos. C-71-1572 & C-71-1713, memo. op. at 2-3 (N.D. Cal. March 22, 1977). In 1906, Congress accepted the basic recommendation, authorizing expenditures to purchase land "for the use of the Indians in California." Act of June 21, 1906, Pub. L. No. 258, ch. 3504, 34 Stat. 325, 333 (1906). The 1906 authorization was renewed in substantially the same terms in 1908, and, in 1909, the Robinson land was purchased for that purpose. *See* Act of April 30, 1908, Pub. L. No. 104, ch. 153, 35 Stat. 70, 76-77 (1908).

While not expressly stating that the United States held the land as trustee, Congress clearly contemplated that this land have the same general status as reservation lands. In addition to purchasing lands, the 1906 Act authorized the Secretary of the Interior to "fence, survey and mark the boundaries of such Indian Reservations." *See generally* UNITED STATES DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW 609 (rev. ed. 1958) (not necessary that Congress use the word "reservation" to create Indian reservation lands); *United States* v. *McGowan*, 302 U.S. 535, 538-39 (1938). Congress also intended that

the Interior Department supervise this Indian property; Interior did so continuously until the termination at issue.[7] In *Mitchell II* (*see* slip opinion, p. 7) we adopted and applied our panel holding in *Navajo Tribe of Indians* v. *United States*, 224 Ct. Cl. ——, ——, 624 F.2d 981, 987 (1980) that, where the Federal Government takes over control or supervision of Indian property, the fiduciary relationship normally exists (unless Congress has provided otherwise) even though nothing is said expressly in the statute about a trust or fiduciary connection. That ruling squarely applies here as well.

This interpretation of the appropriations statutes is reinforced by the Interior Department's long-standing position that the United States had a trust duty to the Robinson band. The Agreed Statement of Facts at pages 12-13 states:

> While the deed to the United States from Jesse Bryant Robinson and his wife did not mention the fact that the Rancheria was to be occupied by Indians and did not expressly create a trust, it was always understood by the Interior Department—after the purchase of the Rancheria—that it was being held by the United States for the use of the East Lake or Robinson Pomo Indians.[8]

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[7] *See* Agreed Statement of Facts, p. 13.

"From the time of the creation of the Robinson Rancheria in 1906 until publication of a termination notice for the Rancheria in 1965, the Secretary of the Interior recognized a federal trust relationship with the Robinson or East Lake Band, as a distinct Indian tribe or band of Indians."

[8] There is no evidence contradicting the view that the responsible agency, the Interior Department, has always be-

See also note 7, *supra*. It is a "venerable principle" that an agency's long-standing interpretation of a statute it is charged with implementing is entitled to great weight. *See, e.g., Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 121 (1973) (quoting *Red Lion*); *Vogt* v. *United States*, 210 Ct. Cl. 246, 252-53, 537 F.2d 405, 409 (1976); *Sode* v. *United States*, 209 Ct. Cl. 180, 187, 531 F.2d 531, 535 (1976).

This principle is particularly compelling when the agency interpretation is reinforced by subsequent congressional legislation (here the 1958 Rancheria Act). *E.g., NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-82 (1969). The Rancheria Act clearly states the understanding of the 1958 Congress that Rancheria lands had been and would continue to be held in trust until final termination. For example, section 9 of the Act allows the Secretary to provide the Indians with special education and training programs "[p]rior to the termination of the Federal trust relationship in accord with the provisions of this Act * * *" Pub. L. No. 85-671, § 9, 72 Stat. 619, 621 (1958); *see id.* at § 3(e), 72 Stat. 619, 620.[9] Another accepted canon states that subsequent legislation declaring the meaning of an earlier statute is entitled to great weight where the earlier legislation permits that interpretation. *See, e.g., Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-81 & n.8

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lieved the United States was trustee of lands for the Robinson band.

[9] Section 3(e) refers to land exchanges "before the termination of the Federal trust."

(1969); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

On the bases of the original authorization acts, reinforced by a long-standing agency interpretation and subsequently confirming congressional legislation, we find (as did the District Court in *Duncan* v. *Andrus*, *supra*) that the United States did have a trust relationship with the Indians on the Robinson Rancheria. *Cf. Smith* v. *United States*, Nos. C-74-1016, WTS, C-74-1061 WTS (N.D. Cal. March 29, 1978) (finding trust relationship with Hopland Rancheria).

B. Unlike the limited trust created in the General Allotment Act (*see Mitchell*, *supra*, 445 U.S. 535), the Congressional trust for the Robinson Rancheria was general and unlimited. Nothing in the wording of the statutes, the course of administration, or the legislative history suggests that the trust had a restricted purpose, or failed to cover the general oversight of the Rancheria land and property for the benefit of the Indians. Defendant urges that a federal trust must spell out specifically all the trust duties of the Government as trustee. That is certainly unnecessary for Indian property with its long and established history (as we pointed out in *Mitchell II*) of governmental fiduciary obligation in the case of management of Indian property. A broad-scale Congressional establishment of a trust is enough.[10] Moreover, the Rancheria Act did recite a number of specific obligations of the Secretary of Interior, including responsibilities which plaintiffs say were clearly left unfulfilled. *See* note 13, *infra*.

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[10] It is difficult to see why Congress should have to do more to create an Indian trust than a private settlor would have to do to establish a private trust.

Chief among these was the directive in § 3(c) (as amended) to construct and improve (before termination) the sanitation and water facilities upon which the Department should agree with the Indians.[11] It is also important, as we stress *infra* (Part IV, C), that the Rancheria Act was designed so that, before termination, the Indian properties were to be raised to such status that the Indians could properly manage on their own after the termination of the trust. More than that, Congress indubitably directed that the Indians should receive the lands, assets, and monies to which they were legally entitled. These are all specific duties expressed and inherent in the Rancheria Act. *See* Part IV, C, *infra.*

C. This legislative creation of a general trust relationship as to the property of the Robinson Rancheria grounds compensation for breach of that trust. Neither the particular statutes nor the history of Interior's supervision signifies any other result. *Mitchell II* holds that, in similar circumstances, Congress has consented to suit in this court for proper compensation. *See Mitchell II*, slip opinion, pp. 8-13.[12] As in that case, we have Congressional legislation

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[11] In *Duncan* v. *Andrus, supra,* the District Court interpreted this requirement (in light of the overall aim of the Rancheria Act) as calling upon the Secretary to provide for the Indians, before termination, water and sanitation facilities which would be adequate for them after termination. *See* the District Court memorandum, pp. 5-10. We agree with that reading of the Act.

[12] *See also Whiskers* v. *United States*, 600 F.2d 1332, 1335, 1337 (10th Cir. 1979). The decision in that case against the Indians turned on the court's conclusion that the specific statute there involved (wholly different from the statutes with which we are concerned) did not create any trust relationship.

dealing with Indian property which was to be managed and controlled by federal officials as fiduciaries in the interest of and for the benefit of the Indians, and from which Congress desired the Indians to obtain the proper economic and financial benefits. The objective to help and benefit these Indians is undeniable. The land was bought "for the use of the Indians in California," and it was always held for that purpose (these Pomo Indians being part of the California Indians). *See* Parts I and IV, A, B, *supra*. And, as the District Court said in *Duncan* v. *Andrus*, *supra*, in the 1958 Rancheria Act "Congress is attempting to end its traditional trust relationship with a group of Indians and to place them on the road to economic self-sufficiency. It was the manifest intent of Congress in enacting the Rancheria Act to grant to Indian distributees economic resources in fee simple that would enable them to sustain themselves as productive and useful citizens, independent of collateral federal programs and benefits." Memo. op. at 9 (N.D. Cal. March 22, 1977).[18] By the same token,

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[18] The purposes of the Rancheria Act, revealed by its terms, were (1) to distribute equitably the assets and lands of the Rancheria (§§ 1, 2, 5), (ii) to raise the Rancheria's roads and water systems, without cost to the Indians, to adequate levels before termination (§ 3, as amended), (iii) to give the Rancheria owners the financial benefits of vacant or unoccupied land sold by the Secretary (§ 5), (iv) to train the Indians for the termination of trust and of Indian status (§ 9), and (v) to distribute to the Indians their funds on deposit (§ 6).

The Secretary's regulations, specifically authorized by the Rancheria Act (§ 12), declare that the property to be distributed to the individual Indians constitutes "vested property which may be inherited or bequeathed but shall not otherwise be subject to alienation or encumbrance before the transfer of title to such property." 25 C.F.R. § 242.7 (1959).

it is inherent in the language and scheme of the Rancheria Act that the Indians were to obtain from the Government land, assets, and funds—not merely intangible or non-material help and encouragement.

Contrary to defendant's argument, this is not a case in which the court, on its own, imposes a trust relationship without clear direction from Congress. Instead, Congress created and maintained a trust involving Indian property—and then provided for its termination, while making clear that trust status was to continue until termination—without ever indicating, by word or by intimation, that the trustee's normal duty of monetary liability for breach of trust was to be abrogated.[14] Prospective injunctive or declaratory relief would not give redress for the types of serious past injury suffered here through breach of trust—as discussed in Parts I, V, and VI, of this opinion. *See Mitchell II*, *supra*, slip op. at pp. 10-11, 13. (In this instance, the plaintiffs bore the consequences of an invalid termination for some twelve years (1965-1977), and in some cases longer, before the termination was judicially held to have been

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[14] The unappealed District Court judgment, *Duncan* v. *Andrus*, *supra*, shows in itself the existence of the substantive right to be vindicated, at the least by affirmative and declaratory relief.

Section 10(a) of the Rancheria Act provided that "the distribution of assets pursuant to such [Secretarially approved] plan shall not be the basis of any claim against the United States by an Indian who received or is denied a part of the asset distributed," but this bar to claims affected only those Indians who were not satisfied with the manner in which the Rancheria's assets were to be divided among the Rancheria Indians in the distribution plan. There is no statement or suggestion barring claims for the breaches of trust by the Secretary asserted here, which had nothing to do with the division of the assets among the Indians.

illegal and a breach of trust.) There is no doubt at all that if, after the distribution plan was accepted, the Secretary (before implementing the plan) had improperly wasted some Indians' property or illegally transferred it to a complete outsider, the affected Indians could sue in this court under 28 U.S.C. § 1491, for the value of those assets under the theory of breach of the statutory trust which had been implemented by the Rancheria Act. We see no adequate reason why a like suit cannot be brought here when (as we show in Part V, *infra*) the Secretary breached the trust by illegally terminating that trust—contrary to the Act—causing comparable detriment to the Indians.

We conclude, therefore, that in the legislation involving the Robinson Rancheria Congress clearly authorized and mandated compensation for federal breaches of trust—and this court is the proper forum (in this case, under 28 U.S.C. § 1491). The substantive claim for monetary compensation was created by the rancheria legislation (including the Rancheria Act) which formed (and continued) a general trust and laid down specific duties—and the right to sue the Government in this court was completed by the Tucker Act, 28 U.S.C. § 1491. *See United States* v. *Mason*, 412 U.S. 391, 394, 398 (1973).[15]

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[15] This case is quite different from our holding that 28 U.S.C. § 1505 (the analogue of the Tucker Act for Indian tribes) does not grant us jurisdiction over claims that Congress itself, in a different termination Act, violated a pre-existing trust (without trenching on the Constitution). Here, federal officials, not Congress, are charged with unauthorized violations of a trust established and maintained by Congress itself. There is no claim that the Rancheria Act was a violation of trust. See our discussion in *Menominee Tribe of Indians* v.

V

Breach of Trust

Defendant concedes that termination of the Robinson Rancheria was unauthorized because Interior did not provide required water and sanitation systems. As we have emphasized, the District Court for the Northern District of California has independently found that the termination was unauthorized. *Duncan* v. *Andrus*, Nos. C-71-1572 & C-71-1713, memo. op. at 7-10 (N.D. Cal. March 22, 1977). However, defendant has argued to us that, although unauthorized, the premature termination was not a breach of trust. Defendant's theory is that the Government had considerable discretion under the 1958 and 1964 statutes, that Interior did provide some water and sewage facilities, and therefore its actions were reasonable, and not a breach of trust.[16] On this record, that theory must fail.

First, *Duncan* v. *Andrus* has already determined that there was a breach of trust. That court held that in negotiating with the Rancheria Indians the Secretary of the Interior "must come to the bargaining table as a fiduciary or trustee of the Indians," but that "the Secretary has fallen far short of his obligations in this case. * * * * The Secretary has ensured neither fairness of procedure nor fairness of result in the Robinson Rancheria water system * * *." We know of no adequate reason why these prior determinations in a suit between the same liti-

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United States, 221 Ct. Cl. ——, ——, 607 F.2d 1335, 1340, 1343-44 (1979), *cert. denied*, 445 U.S. 950 (1980).

[16] This contention does not seem to have been repeated in the presentation on remand.

gants should fail to be binding on defendant and on us. *See Montana* v. *United States*, 440 U.S. 147 (1979); *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979).

Second, even if we are to canvass the issue anew, we come to the same result. Although the Secretary has discretion as to the amount and kind of water and sanitation systems, this does not allow him to terminate before ensuring a water supply sufficient to meet reasonable domestic needs. Section 3(c) of the Rancheria Act demonstrates a Congressional purpose to provide the Indians with sufficient water systems to become self-sufficient by the time of termination. *See* the discussion in *Duncan* v. *Andrus*, Nos. C-71-1572 & C-71-1713 (N.D. Cal. March 22, 1977), and text at note 11, and note 11, *supra*, as well as our discussion *infra*. The uncontested facts show that the Secretary fell considerably short of providing sufficient water supplies to the Robinson Rancheria. *See* Part I, *supra*.

Moreover, the standard of duty for the United States as trustee for Indians is not mere "reasonableness," but the highest of fiduciary standards. *See, e.g., United States* v. *Mason*, 412 U.S. 391, 398 (1973); *Coast Indian Community* v. *United States*, 213 Ct. Cl. 129, 153, 550 F.2d 639, 652-53 (1977); *Cheyenne-Arapaho Tribes* v. *United States*, 206 Ct. Cl. 340, 345, 512 F.2d 1390, 1392 (1975); *Manchester Band of Pomo Indians, Inc.* v. *United States*, 363 F. Supp. 1238, 1243 (N.D. Cal. 1973). Under these fiduciary standards the Secretary breached his trust obligations. Procedurally, Interior failed to disclose adequately to the Indians their statutory rights to water-carried sewage systems or the limits on congressional funds provided for pretermination serv-

ices.[17] Substantively, the distribution plan's agreement on water supplies was so vague and uncertain, and so unlikely to fulfill the Congressional objective, as to breach the trustee's duty of fair dealing. *See* the discussion in *Duncan* v. *Andrus*, *supra*; *cf. Smith* v. *United States*, Nos. C-74-1016 WTS & C-74-1061 WTS (N.D. Cal. March 29, 1978) (United States breached its trust duty to Hopland Rancheria Indians by failing to provide adequate water supplies). In the words of *Duncan* v. *Andrus*, it was of "critical importance" to carry out the legislative aim, which was to grant the Indians self-sufficiency, that their lands be "livable and agriculturally viable," of which "water is an indispensable incident." There is no doubt on the presentation to us, that a serious breach of trust occurred under the standards set forth in *Mitchell II*, Part III, D (slip op., pp. 13-14).[18]

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[17] Plaintiffs say, not unreasonably, that this failure was significant because these Rancheria Indians could not be compelled to agree to a termination plan and would not have agreed if the true circumstances had been revealed to them.

[18] Ours is not a complete catalogue of the breaches which may have been committed, but examples of the types of breaches caused by the concededly unauthorized termination. On remand, plaintiffs are free to prove other breaches (if they can) in connection with their damage claims (*see* Part VI, *infra*); the standards of *Mitchell II*, Part III, D, are of course applicable.

By citing a breach of trust denominated as a duty of fair dealing we are not invoking the "fair and honorable dealing" jurisdiction of the former Indian Claims Commission. Rather, we illustrate a breach of duty under a statutory trust mandating compensation by the Government.

VI

Damages

Plaintiffs originally presented a wide variety of damage demands outlined in three separate claims. The first, based on the Government's failure to supply adequate water and on the termination itself, seeks recovery of $100,000 for each plaintiff for a number of resulting injuries including losses caused by subjection to real property taxes, deprivation of various federal services to Indians, partial destruction of the Pomo culture, and emotional distress and bodily injuries.[19] The second claim, predicated on the Government's failure to provide adequate sanitation facilities, requests $10,000 for each plaintiff based on the following three injuries:

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[19] Plaintiffs' petition lists the damages under the first claim as follows:

(a) The integrity of their Rancheria has been destroyed and much of the Rancheria's lands have falled [sic] into non-Indian ownership;

(b) They, and other Indians of Robinson Rancheria, have been subjected to land taxation;

(c) Their native Pomo culture has been partially destroyed and is now grievously threatened with complete extinction;

(d) They, and other Indians of the Rancheria, have been subjected to regulation by California of home building activities on the Rancheria which are inconsistent with an Indian way of life;

(e) They have been forced to live without adequate water or sanitation facilities for more than ten years:

(f) The have suffered, as a result, grevous [sic] emotional distress and bodily injuries;

(g) They, and their dependents, have been deprived of eligibility for a wide variety of federal services and benefits provided to Indians by the United States because of their status as Indians.

a) They have been deprived of operable sanitation and waste-disposal facilities for over ten years, have been forced to resort to outdoor privies, and have gone without indoor privies, and have gone without indoor bathing facilities;

b) They have been deprived of indoor plumbing and the opportunity to raise their families in a decent, safe, and sanitary condition;

c) They will, in the future, be deprived of such sanitation facilities.

The third claim seeks recovery for Interior's failure to reserve a right-of-way easement to the community woodlot. Damages in the amount of $5,000 for each plaintiff are sought for these deprivations:

a) They have been deprived of access to their woodlot for over ten years;

b) They have been deprived of marketable title to their woodlot for over ten years;

c) Their woodlot has been decreased in value and they will be deprived in the future of access to it.

While some of plaintiffs' damage claims clearly fall within the types of monetary damages previously considered by this and other courts, other demands are premised on unusual theories (compensation for injury to native culture or for psychological injuries). A survey of recent Indian cases in this court alleging a Government breach of trust reveals that monetary damages have been limited to tangible direct injuries to property or to direct losses due to denials of required services. In *Klamath & Modoc Tribes* v. *United States*, 174 Ct. Cl. 483 (1966), the Indians sought recovery for reservation property sold by the Govern-

ment at an allegedly inadequate price.[20] In *Navajo Tribe* v. *United States*, 176 Ct. Cl. 502, 364 F.2d 320 (1966), the court awarded damages on one claim for a Government breach of trust in failure to notify the Indians of an assignment of their lease; damages were calculated based on the then present value of the lease. In *Capoeman* v. *United States*, 194 Ct. Cl. 664, 440 F.2d 1002 (1971), the plaintiffs' breach of trust claims were grounded on allegedly unjustifiable Government costs assessed from sales of timber from Indian property. The same damage claims were also raised in *Quinault Allottee Ass'n* v. *United States*, 202 Ct. Cl. 625, 485 F.2d 1391 (1973), *cert. denied*, 416 U.S. 961 (1974). Plaintiffs had an even more tangible damage claim in *Cheyenne-Arapaho Tribes* v. *United States*, 206 Ct. Cl. 340, 512 F.2d 1390 (1975), alleging the Government as trustee mismanaged specific funds held for the Indians. In another case which awarded damages on a breach of trust claim, *Coast Indian Community* v. *United States*, 213 Ct. Cl. 129, 550 F.2d 639 (1977), the court compensated plaintiffs for a sale by the Government of an Indian right-of-way at a grossly inadequate price. The calculation of damages was based on the difference between the fair value of the right-of-way and the actual sale price. Most recently, in *Mitchell II*, *supra*, this court remanded for further proceedings breach of trust claims based on a failure to properly manage Indian forest lands or to invest Indian funds.

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[20] Because the case was presented to the court on defendant's motion to dismiss for lack of jurisdiction, the court did not analyze what damages were recoverable. In a subsequent consideration of the same claims, the court found liability as to certain lands only on a Fifth Amendment taking theory. *Klamath & Modoc Tribes* v. *United States*, 193 Ct. Cl. 670, 436 F.2d 1008, *cert. denied*, 404 U.S. 950 (1971).

Similarly, a review of the Supreme Court's decision in *United States* v. *Mason*, 412 U.S. 391 (1973), and lower federal court cases cited to us reveals no case in which any court considered damage claims as nebulous and remote as some urged here.[21]

This lack of precedent for recovery of monetary damages for consequential personal suffering or injury to the native culture reflects the difficulties which compel rejection of such claims. The doctrine of sovereign immunity, as applied to pecuniary claims in this court, requires the court to find that a statute can be interpreted as "mandating compensation by the Federal Government for the damage sustained." *Eastport S.S. Corp* v. *United States*, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967) *quoted with approval, United States* v. *Testan*, 424 U.S. 392, 400 (1976). We have found here, as in *Mitchell II*, *supra*, that this statutorily-created trust relationship does mandate certain types of compensation for a breach. However, it does not follow that the congressional scheme mandates compensation for every conceivable form of damages. As discussed *supra*, this and other courts have thus

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[21] In *Mason*, although the claims were rejected on the merits, plaintiffs claimed direct damages from allegedly invalid state tax assessments on their land. *See also Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977) (claims based on county zoning regulation of Indian lands, only declaratory and injunctive relief sought); *Manchester Band of Pomo Indians, Inc.* v. *United States*, 363 F.Supp. 1238 (N.D. Cal. 1973) (damages arising from federal mismanagement of Indian trust funds); *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F.Supp. 252 (D.D.C. 1972) (claims based on Secretary's misallocation of tribal water rights; declaratory relief granted); *Smith* v. *United States* Nos. C-74-1016 WTS & C-74-1061 WTS (N.D. Cal. March 29, 1978) (damages granted for state taxation of rancheria trust lands which were prematurely terminated).

far found congressional allowance for basically two types of standard trust claims—losses due to mismanagement of trust funds, see *Capoeman* v. *United States*, 194, Ct. Cl. 664, 440 F.2d 1002 (1971); *Quinault Allottee Ass'n* v. *United States*, 202 Ct. Cl. 625, 485 F.2d 1391 (1973), *cert. denied*, 416 U.S. 961 (1974); *Cheyenne-Arapaho Tribes* v. *United States*, 206 Ct. Cl. 340, 512 F.2d 1390 (1975), or losses due to mismanagement of tangible trust properties, *see Klamath & Modoc Tribes* v. *United States*, 174 Ct. Cl. 483 (1966); *Navajo* v. *United States*, 176 Ct. Cl. 502, 364 F.2d 320 (1966); *Coast Indian Community* v. *United States*, 213 Ct. Cl. 129, 550 F.2d 639 (1977); *Mitchell II*, *supra*. Direct monetary damage due to improper subjection to state or local taxes, as a result of a federal breach of trust, would also seem to fall squarely within the same category. *See Smith* v. *United States*, Nos. C-74-1016 WTS and C-74-1061 WTS (N.D. Cal. March 29, 1978); *cf. United States* v. *Mason*, 412 U.S. 391, 398 (1973). These are all injuries proximately caused by the breaches of trust shown here—the most significant of which was the improper termination by the Secretary—and, accordingly, are included within the range of property recovery.

There is a problem as to recovery of the value of benefits (*e.g.* health, education, and sanitary benefits) improperly withheld after the unlawful termination. Our present difficulty is that we do not now know (the point has not yet been adequately presented) the statutory or regulatory source of these benefits, and whether the Indians could sue for them *in this court* if, wholly apart from termination, the Secretary had arbitrarily or unlawfully decided to withhold them. If the Indians could not sue here if there had been such an arbitrary or illegal refusal to grant these

benefits, the unlawful termination (and the trust breach) would not grant claimants a right to recover in this court which they would not otherwise have. There would then be no basis in statute or regulation for damages to be awarded by us. On the other hand, if they could sue here for such an arbitrary or unlawful withholding, the invalid termination would seem to be the equivalent of an otherwise arbitrary or unlawful refusal, and damages could be allowed.[22] The matter must be left to the trial judge for further development.

As we have indicated, at least two of plaintiffs' bases for claimed damage—injury to Pomo culture and consequential emotional and psychological injuries—go far beyond the types of damage normally awarded, and we cannot find any express or implied Congressional authorization for such a recovery. These demands are very close kin to charges of destruction of Indian peoplehood which even the broad rubrics of the Indian Claims Commission Act did not cover. *See Gila River Pima-Maricopa Indian Community* v. *United States* (Davis, J., concurring), 190 Ct. Cl. 790, 801, 427 F.2d 1194, 1200, *cert. denied*, 400 U.S. 819 (1970). Moreover, such alleged cultural or psychological injuries fall wholly outside of the purview or objectives of the statutory standards which Congress has often established for management of Indian funds or property. *See, e.g., Mitchell II supra; Manchester Band of Pomo Indians, Inc.* v. *United States*, 363 F. Supp. 1238, 1243 (N.D. Cal. 1973) ("Congress has also been vigilant in setting forth the standards by which Government-managed Indian trust

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[22] In that event, it was an arbitrary or illegal refusal to withhold these services and benefits solely on the ground of a termination that was not a lawful one.

funds must be invested.") Nor do such cultural or emotional losses fall into the category of damages where standards of duty and measures of recovery are provided by traditional trust law doctrines. *Cf. Coast Indian Community* v. *United States*, 213 Ct. Cl. 129, 550 F.2d 639 (1977) (sale of trust property at unfairly low price; damages based on difference between fair market value of trust land and actual sales price); *Navajo Tribe* v. *United States*, 176 Ct. Cl. 502, 364 F.2d 320 (1966) (assignment of lease without notice to beneficiary; damages based on market value of lease). In the absence of some indication of Congressional authorization and without statutory or common law standards of trustee duty and of compensation, we cannot discover any mandate for allowance of these two alleged consequential losses.[23] *See Mitchell II supra*, slip op. p. 13.

Other of the damage claims we leave open without decision until facts are more fully developed so as to reveal more precisely the circumstances of the asserted injury and the connection, direct or otherwise, between that loss and the Government's breach.

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[23] The practical difficulties of assessing causation and an appropriate quantum of damages for such cultural and emotional injuries said to arise from a breach of trust are also considerable, not to speak of how to determine what was Pomo culture before the breach and what impact the breach had on the then-existing Indian society. The Supreme Court has recently implied, in a case involving judicial inquiry into tribal membership standards, that the federal judiciary might well be wary of entering into such uncharted fields: "Given the often vast gulf between tribal tradition and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 72 n.32 (1978).

In this group are the sale by Robinson Indians of much of the Rancheria's lands to non-Indian owners,[24] and the subjection of the Robinson Indians to regulation by California of home-building activities. For the latter, if plaintiffs can demonstrate that the Government's unlawful termination exposed them to state regulations which directly and proximately increased the pecuniary costs of building or maintaining homes on the Rancheria, then recovery should be allowed (but damages should not be awarded because state regulation was "inconsistent with an Indian way of life"). As for alleged physical injuries to plaintiffs or their families due to the breach, we also leave the question of compensability wholly open for future development and decision.

To sum up on damages, on remand to the Trial Division for determination of the extent and amount of Government liability, the trial judge should award: (a) damages directly due to the trustee's proven mismanagement (through misfeasance or nonfeasance) of land or physical property (*e.g.*, alleged failure to provide a right-of-way to the community woodlot, if that was a breach of trust), or of funds, and (b) damages directly due to the loss of tax immunities during the invalid termination. Claims for injury to Indian culture (or for happenings inconsistent with the "Indian way of life") or for personal or family psychological distress are not recoverable. The other damage claims are left open for later decision in accordance with this opinion (depending in large part on the showing to be made). The test

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[24] This undecided category does not include the loss of land through tax sales—damages which we consider to be a recoverable and direct consequence of improper imposition of state or local taxes.

should always be that of proximate causation by a proven breach of trust.

VII

Statute of Limitations

Defendant also contends that, even if this court has jurisdiction over the breach of trust claims, the action is barred by the six-year statute of limitations, 28 U.S.C. § 2501 (1976). The Government's point is that the invalid termination was announced on September 6, 1965, and plaintiffs' petition in this court bears the date of February 5, 1975, obviously more than six years later. The easiest reply is that plaintiffs had validly filed a claim for damages in the United States District Court (as part of *Duncan* v. *Andrus*, *supra*) on August 19, 1971, within the six-year period. After amending the complaint to increase damages above the District Court's $10,000 jurisdictional limit, plaintiffs were granted a transfer to this court under 28 U.S.C. § 1406(c) (1976). The transfer order was received here on January 17, 1975, and plaintiffs simply refiled their claim on February 5, 1975, to conform with the rules of this court. *See* Ct. Cl. R. 181.

The transfer statute clearly mandates that upon transfer the case shall proceed "* * * as if it had been filed in the Court of Claims on the date it was filed in the district court." 28 U.S.C. § 1406(c) (1976). This statute has been liberally construed to lift an otherwise existing statute of limitations bar, and this construction is amply supported in the legislative history. *E.g. Rothman* v. *United States*, No. 363-77 (Ct. Cl. order Jan. 26, 1979), 219 Ct. Cl. ——; *see* S. REP. No. 1894, 86th Cong., 2d Sess. 4 (1960) *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 3583,

3585. It is clear, therefore, that plaintiffs' claims are not barred.

Plaintiffs' motion for partial summary judgment on the issue of liability is granted. Defendant's motion to dismiss for lack of jurisdiction or for failure to meet the statute of limitations is denied. The case is remanded under Rule 131(c) to the Trial Division for determination of the nature and extent of damages in conformity with this opinion.[25]

NICHOLS, *Judge*, concurring:

I concur because I cannot urge the panel not to follow the recent *en banc* decision *Mitchell* v. *United States*. Ct.Cl. Nos. 772-71, 773-71, 774-71 and 775-71 (slip opinion of October 21, 1981). I dissented therein and of course nothing said by the court here eases my difficulties. The law of this court now is, however, if a statute creates or recognizes the United States as general trustee of Indian property, that legislation founds a substantive money claim for breach of that trust which the Indian beneficiary may vindicate by a suit for breach of trust in this court under 28 U.S.C. § 1491, and 28 U.S.C. § 1525, if applicable; this notwithstanding that no statutory language expressly or impliedly states that the United States will make good any adverse consequences of the errors or

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[25] Plaintiffs also premise liability on a breach of contract theory, arguing that the termination agreement itself constituted a contract which the United States breached. In view of our disposition, we do not reach the alternative contention. Likewise, we do not reach at this time plaintiffs' claim of a Fifth Amendment taking; plaintiffs have leave to preserve and renew that contention after the full facts are determined in the Trial Division.

malfeasance of its officers in the premises, despite that the United States is not subject to suit unless it consents to be sued, and despite the rules as to how to identify such consent, spelled out by precept and example in cases such as *United States* v. *Testan*, 424 U.S. 392 (1976). There is no use debating the matter again at this level. We await reactions elsewhere, and if there are none, or none adverse, I shall be happy to be proven wrong. This righting of injustice is a thing I would wish us to be doing more of, and these claimants have an appealing case.

It is important, however, to note that a trust is a trust, and a suit on a trust theory must claim a breach of the trustee's peculiar duties. For a trust to exist there must be identifiable a trustee, a *res* and a beneficiary. A trustee can be guilty of actionable misconduct on a trust theory only with respect to the *res* in his possession and control, and he owes no duty to the beneficiary *dehors* the *res*. A trustee is not *qua* trustee a social worker, a guardian, a pedagogue, or a physician. Any of these might be under a legal duty, *e.g.*, to warn a relief client, a ward, a student, or a patient, of the evils of drink, but a trustee would not, nor would he be liable if the unwarned beneficiary (not his relief client, ward, student, or patient) became an alcoholic (always assuming the trust *res* was not a cellar of fine old booze, which the beneficiary consumed at an excessive rate). In the instant suit, as in many others, the petition reveals a state of complete confusion as to the capacity in which the United States misconducted itself and the source of the duties for breach of which it is to be held liable. This confusion to some extent carried over into our first *Duncan* opinion. The court's opinion now embodies a commendable effort to straighten the mat-

ter out, but I do not labor under the delusion it will not be necessary to address it again.

Why the United States should be liable as trustee and not as case worker, guardian, pedagogue, or physician, is a question that, no doubt, is neither here nor there at present. Once the trustee's liability is firmly established, or reestablished, our systematizers can go to work on the other problems.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 10-75

(Decided April 18, 1979)

MABEL DUNCAN, ET AL.

v.

THE UNITED STATES

Before DAVIS, KASHIWA, and KUNZIG, *Judges.*

ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO DISMISS

DAVIS, *Judge*, delivered the opinion of the court:

Plaintiffs, Pomo Indians of the Robinson Rancheria in Northern California, have attacked the termination by the United States of their rancheria status in 1965. In the companion district court case against the Secretary of the Interior (and other federal officials), *Duncan* v. *Andrus*, Nos. C-71-1572 and C-71-1713 (N.D. Cal. March 22, 1977), they obtained declaratory and injunctive relief grounded on that court's determination that the termination was unlawful. In the present suit (initially part of the District Court litigation but transferred here under 28

U.S.C. § 1406 (c)), claimants seek monetary recovery for damages resulting from the invalid termination. They have moved for partial summary judgment on liability, urging that the 1965 termination was a breach of trust and rendered the federal Government responsible for various pecuniary damages.[1] Defendant has cross-moved to dismiss for lack of jurisdiction and because plaintiffs' claims are allegedly barred by the statute of limitations.

We find no jurisdictional or limitation bar to this suit and conclude that plaintiffs are entitled to partial summary judgment on the issue of liability. We hold, too, that certain of plaintiffs' monetary claims are plainly recoverable if proved; that some other types of damages are clearly not recoverable; and that still other kinds may or may not be recoverable, depending mainly on the factual nature and proof of these damage claims.

I.

Background

The facts on which we base this decision are presented in plaintiffs' uncontested affidavit and in the exhibits accompanying their motion for partial summary judgment. The primary exhibit is a detailed "Agreed Statement of Facts," filed on both sides (plaintiffs and the defendant Government officials) in the District Court case, *Duncan* v. *Andrus*, *supra*. This "Agreed Statement" was specifically adopted by the District Court. That court's opinion (which also

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[1] Plaintiffs also premise liability on a breach of contract theory, arguing that the termination agreement itself constituted a contract which the United States breached. Because we find defendant liable for breach of trust, we do not reach plaintiffs' alternative contention.

contains its independent findings) is likewise a source of underlying predicates for our determination; under the principles of collateral estoppel there can be no relitigation of the issues determined in that related proceeding by the same plaintiffs against high federal officials (acting in their official capacity). *See, e.g., Edgar* v. *United States*, 145 Ct. Cl. 9, 171 F. Supp. 243 (1959); *McGinty* v. *United States*, 151 Ct. Cl. 399, 403 (1960); *cert. denied*, 368 U.S. 867 (1961); RESTATEMENT (SECOND) OF JUDGEMENTS, § 80, Comment e at 22-23, Reporter's Note at 29 (Tent. Draft No. 2, 1975).[2]

Rancherias are numerous small Indian reservations or communities in California, the lands for which were purchased by the Government (with congressional authorization) for Indian use from time to time in the early years of this century—a program triggered by an inquiry (in 1905-06) into the landless, homeless or penurious state of many California Indians. We are now concerned with the Robinson Rancheria (in Lake County California) which consists of the Rancheria proper and a nearby uninhabited wood reserve, known as the "Woodlot." The Rancheria land was purchased in 1909 under authorization contained in Indian appropriations acts of 1906 and 1908. The Rancheria was occupied by a California band of Pomo Indians and the land was informally assigned to families of that band.

After several investigations and much debate, Congress in 1958 passed an act providing for the termination of various rancherias and reservations, includ-

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[2] Defendant, although characterizing or interpreting the facts in the Agreed Statement and the District Court's opinion somewhat differently from plaintiffs, does not basically contest those facts.

ing the Robinson Rancheria. Pub. L. No. 85-671, 72 Stat. 619 (1958) (the "Rancheria Act"). This law provided for termination of the special status (as Indian lands) of various California rancherias upon approval by a majority of the affected Indians of a final distribution plan. Section 3 of the Act directed the Secretary to undertake various construction projects and improvements on the Indian land before conveying it under the distribution plan. Section 3(c), which founds the gravamen of plaintiffs' complaint, required the Secretary to: "install or rehabilitate such irrigation or domestic water systems as he and the Indians affected agree, within a reasonable time, should be completed by the United States." Rancheria Act, 72 Stat. 619, 620 (1958).[3] Under the Act termination of the Rancheria ended the rights of the Indians to receive special federal services *qua* Indians, and exposed rancheria lands to state tax liability and regulations. Rancheria Act § 10(b), 72 Stat. 619, 621 *as amended* by Pub. L. No. 88-419, § (h), 78 Stat. 390, 391 (1964); *see* Rancheria Act § 2(d), 72 Stat. 619.

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[3] Section 3(e) was significantly modified by the 1964 amendments to the Rancheria Act. The amendments expanded the scope of the Secretary's responsibility to include sanitation facilities and delegated responsibility for sanitation facilities to the Department of Health, Education, and Welfare. *See* Pub. L. No. 88-419, 78 Stat. 390 (1964). Even before the 1964 amendments (which were effective before termination of the Robinson Rancheria) it was clear that the Government had some responsibility to provide Indians with sanitation systems. Under a 1959 statute the Surgeon General was authorized to construct or improve sanitation facilities on Indian lands. Pub. L. No. 86-121, § 1, 73 Stat. 267, *amending* Pub. L. No. 568, ch. 658, 68 Stat. 674 (1954) (codified at 42 U.S.C. § 2004a (1976)).

Pursuant to the Act, the Secretary of the Interior developed a distribution plan for the Robinson Rancheria which won majority approval in March 1960. The plan provided for distribution of Rancheria lands to 28 named Indians and for the woodlot and certain community property to be conveyed to an association of the Robinson band. Although distribution of Rancheria assets was completed in 1963, final termination was delayed by negotiations over construction of a sewage system. A final termination notice was published in the *Federal Register* on September 3, 1965. 30 Fed. Reg. 11,330-31 (1965).

Despite serious and well-known water shortages at the Rancheria (the water supply was not sufficient for reasonable domestic needs and was inadequate to irrigate domestic gardens or farm lands), the Secretary made no significant provision for the improvement of Rancheria water supplies prior to termination. The only agreement relating to additional water supplies was a statement in the distribution plan that:

> The Indians of Robinson Rancheria request that the Bureau of Indian Affairs undertake the following actions: * * * (2) Provide water for any residence under construction that is as much as fifty percent completed within a ninety-day period after acceptance of this plan by a majority of the adult Indian distributees, as provided in Section 2(b) of Public Law 85-671.

This statement does not guarantee an adequate year-round water supply, and the record does not indicate how many, if any, of the affected Indians had houses fifty percent complete within the requisite 3-month period.

Similarly, the existing Rancheria sanitation system was grossly inadequate. Most homes lacked any

internal plumbing, and there was no water-carried waste system on the Rancheria. After learning of the 1959 statute authorizing the Surgeon General's office to construct water disposal systems on Indian lands, the Robinson band requested a sewage system. *See* Pub. L. No. 86-121, § 1, 73 Stat. 267 (codified at 42 USC § 2004a (1976)). The Public Health Service did install some septic tank and absorption field facilities pursuant to a 1964 agreement with the Indians, but some of the absorption fields proved inadequate and no adequate water-carried sewage system was ever provided.

After the initial distribution of Rancheria assets in 1961, Lake County imposed a real property tax on lands held by the Robinson band. This taxation continued until 1977, when the District Court found that the Robinson Rancheria had been unlawfully terminated. *Duncan* v. *Andrus*, *supra*, Nos. C-71-1572 & C-71-1713, memo. op. at 11 (N.D. Cal. March 22, 1977).[4] That court granted various types of nonmonetary injunctive and declaratory relief, including (a) voiding of the termination insofar as it ended the plaintiffs' status as Indians and their eligibility for federal services and benefits provided to Indians by the United States, (b) retention by the plaintiffs (and all dependent members of their families) of their status as Indians under federal law, (c) contin-

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[4] The District Court placed its decision primarily on the Government's failures with respect to the water and sanitation facilities. The judge also pointed out that "[t]he Indians of the Robinson Rancheria were not represented by counsel in negotiating and approving the termination agreement" and suggested that the Government's procedure in dealing with those Indians with respect to the water systems was not fully fair.

ued application to the Indians of the Robinson Rancheria of all statutes of the United States which affect Indians because of their status as Indians, and (d) restoration of trust status to the land and assets of the Robinson Rancheria where possible.

II.

Jurisdiction Over Breaches of Trust

We begin with the premise that this court has jurisdiction to award certain types of damage for breach of trust. Defendant has made a threshold attack on this court's jurisdiction, arguing that, even if a statute establishes a trust relationship, that law does not "fairly mandate compensation" under the *Eastport Steamship* standard adopted by the Supreme Court in *Testan*. *See Eastport S.S. Corp.* v. *United States*, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967), *quoted in United States* v. *Testan*, 424 U.S. 392, 400 (1976). The definitive answer is that this broad jurisdictional attack was recently rejected en banc in *Mitchell* v. *United States*, 219 Ct. Cl.—— (Jan. 24, 1979). Defendant's arguments were fully considered and disapproved in that case. Nos. 772-71, 773-71, 774-71, 775-71, slip op. at 2-3, 4-5 & n.12 (Ct. Cl. Jan. 24, 1979). Further, this court and another court have previously awarded damages for a Government breach of trust with respect to other rancherias. *See Coast Indian Community* v. *United States*, 213 Ct. Cl. 129, 152-56, 550 F.2d 639, 652-54 (1977) (damages for breach of trust in selling rancheria land at price grossly below market value); *Manchester Band of Pomo Indians, Inc.* v. *United States*, 363 F.Supp. 1238 (N.D. Cal. 1973) (finding liability for Government breach of trust under 28

U.S.C. § 1346(a)(2), the district court analogue to the Tucker Act).

Starting from *Mitchell*, we proceed to the four issues remaining in the case: did a trust relationship exist between the United States and the Robinson Rancheria Indians; if so, was the trust breached; if breached, what types of damages can plaintiffs properly claim; are plaintiffs' claims barred by the statute of limitations?

III.

The Trust Relationship

In *Duncan* v. *Andrus*, *supra*, the District Court found that until the purported termination legal title to the land of the Robinson Rancheria remained in the United States, "although it was acknowledged that the United States held in trust for the California Indians."[5] Not only are we bound by that ruling under the doctrine of issue preclusion, but we agree with it and come to the same conclusion on our own. We do so on the basis of the context and language of the original appropriations acts authorizing purchase of the Robinson tract; the contemporaneous and continuing interpretation by the agency charged with supervision of the rancherias; and the wording of the 1958 Rancheria Act demonstrating a subsequent Congress' acknowledgment of the trust relationship.

The original appropriations acts which authorized purchase of the Robinson (and other) rancheria lands

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[5] The court's decree held the Secretary of the Interior and his subordinates "under a continuing duty to restore trust status to the lands and assets of the Robinson Rancheria where possible." Some of the lands had been sold in good faith to non-Indians during the period of the unlawful termination (1965-1977) and restoration of trust status was not required as to such lands.

were passed in response to the Kelsey Report. At the request of the Indian Office Mr. Kelsey had surveyed the situation of California Indians and recommended that Congress appropriate monies to provide reservations for homeless Indians, and adequate water-supplied allotments for Indians holding desert allotments. *See Duncan* v. *Andrus*, Nos. C-71-1572 & C-71-1713, memo. op. at 2-3 (N.D. Cal. March 22, 1977). In 1906 Congress accepted the basic recommendation, authorizing expenditures to purchase land "for the use of the Indians in California." Act of June 21, 1906, Pub. L. No. 258, ch. 3504, 34 Stat. 325, 333 (1906). The 1906 authorization was renewed in substantially the same terms in 1908, and in 1909 the Robinson land was purchased. *See* Act of April 30, 1908, Pub. L. No. 104, ch. 153, 35 Stat. 70, 76-77 (1908).

While not expressly stating that the United States held the land as trustee, Congress clearly contemplated that this land have the same status as reservation lands. In addition to purchasing lands the 1906 Act authorized the Secretary of the Interior to "fence, survey and mark the boundaries of such Indian Reservations." *See generally* UNITED STATES DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW 609 (rev. ed. 1958) (not necessary that Congress use the word "reservation" to create Indian reservation lands). Congress need not expressly use a talismanic phrase such as "trust relationship" or "hold in trust" in order to establish a trust relationship. *See Cherry* v. *United States*, No. 73-77, slip op. at 6-7 (Ct. Cl. Feb. 21, 1979).

This interpretation of the appropriations statutes is reinforced by the Interior Department's long-standing presumption that the United States had a

trust duty to the Robinson band.[6] The Agreed Statement of Facts at pages 12-13 state:

> While the deed to the United States from Jesse Bryant Robinson and his wife did not mention the fact that the Rancheria was to be occupied by Indians and did not expressly create a trust, it was always understood by the Interior Department—after the purchase of the Rancheria—that it was being held by the United States for the use of the East Lake or Robinson Pomo Indians.

It is a "venerable principle" that an agency's long-standing interpretation of a statute it is charged with implementing is entitled to great weight. *See, e.g., Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 121 (1973) (quoting *Red Lion*); *Vogt* v. *United States*, 210 Ct. Cl. 246, 252-53, 537 F.2d 405, 409 (1976); *Sode* v. *United States*, 209 Ct. Cl. 180, 187, 531 F.2d 531, 535 (1976). This principle is particularly compelling when the agency interpretation is reinforced by subsequent congressional legislation (here the 1958 Rancheria Act). *E.g., NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-82 (1969). The Rancheria Act clearly states the understanding of the

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[6] At oral argument counsel for defendant initially appeared to concede that the United States had a statutory trust duty to the Robinson band. Later, counsel apparently withdrew or significantly modified this concession. Whatever defendant's exact position in this litigation, there is no evidence contradicting the view that the responsible agency, the Interior Department, has always believed the United States was trustee of lands for the Robinson band.

1958 Congress that Rancheria lands had been and would continue to be held in trust until final termination. For example, section 9 of the Act allows the Secretary to provide the Indians with special education and training programs "[p]rior to the termination of the Federal trust relationship in accord with the provisions of this Act * * *" Pub. L. No. 85-671, § 9, 72 Stat. 619, 621 (1958); *see id.* at § 3(e), 72 Stat. 619, 620.[7] Another accepted canon states that subsequent legislation declaring the meaning of an earlier statute is entitled to great weight where the earlier legislation permits that interpretation. *See, e.g., Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-81 & n.8 (1969); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). On the bases of the original authorization acts, reinforced by a long-standing agency interpretation and subsequently confirming congressional legislation, we find (as did the District Court in *Duncan* v. *Andrus, supra*) that the United States did have a trust relationship with the Indians on the Robinson Rancheria. *Cf. Smith* v. *United States*, Nos. C-74-1016, WTS, C-74-1061 WTS (N.D. Cal. March 29, 1978) (finding trust relationship with Hopland Rancheria).[8]

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[7] Section 3(e) refers to land exchanges "before the termination of the Federal trust."

[8] The unreported district court case (currently on appeal in the Tenth Circuit Court of Appeals) cited to us by defendant), *Whiskers* v. *United States*, No. C-314-73 (Cen. D. Utah March 22, 1977), is not contrary to our conclusion. The District Court in *Whiskers* held it lacked jurisdiction over part of that plaintiff's claim simply because it found no trust relationship created by the statute (different from the Rancheria statutes) before it.

IV.

Breach of Trust

Defendant concedes that termination of the Robinson Rancheria was unauthorized because Interior did not provide required water and sanitation systems. As we have emphasized, the District Court for the Northern District of California has independently found that the termination was unauthorized. *Duncan* v. *Andrus*, Nos. C-71-1572 & C-71-1713, memo. op. at 7-10 (N.D. Cal. March 22, 1977). However, defendant argues to us that, although unauthorized, the premature termination was not a breach of trust. Defendant's theory is that the Government had considerable discretion under the 1958 and 1964 statutes, that Interior did provide some water and sewage facilities, and therefore its actions were reasonable, and not a breach of trust. On this record that theory must fail.

First, *Duncan* v. *Andrus* has already determined that there was a breach of trust. That court held that in negotiating with the Rancheria Indians the Secretary of the Interior "must come to the bargaining table as a fiduciary or trustee of the Indians," but that "the Secretary has fallen far short of his obligations in this case. * * * The Secretary has ensured neither fairness of procedure nor fairness of result in the Robinson Rancheria water system * * *." We know of no adequate reason why these prior determinations in a suit between the same litigants should fail to be binding on defendant and on us. *Cf. Parklane Hosiery Co.* v. *Shore*, 47 U.S.L.W. 4079 (1979).

Second, even if we were to canvass the issue anew, we would come to the same result. Although the Secretary has discretion as to the amount and kind of water and sanitation systems, this does not allow him

to terminate before ensuring a water supply sufficient to meet reasonable domestic needs. Section 3(c) of the Rancheria Act demonstrates a congressional purpose to provide the Indians with sufficient water systems to become self-sufficient by the time of termination. *See* the discussion in *Duncan* v. *Andrus*, Nos. C-71-1572 & C-71-1713 (N.D. Cal. March 22, 1977). The uncontested facts show that the Secretary fell considerably short of providing sufficient water supplies to the Robinson Rancheria.

Moreover, the standard of duty for the United States as trustee for Indians is not mere "reasonableness," but the highest of fiduciary standards. *See, e.g., United States* v. *Mason*, 412 U.S. 391, 398 (1973); *Coast Indian Community* v. *United States*, 213 Ct. Cl. 129, 153, 550 F.2d 639, 652-53 (1977); *Cheyenne-Arapaho Tribes* v. *United States*, 206 Ct. Cl. 340, 345, 512 F.2d 1390, 1392 (1975); *Manchester Band of Pomo Indians, Inc.* v. *United States*, 363 F.Supp. 1238, 1243 (N.D. Cal. 1973). Under these exacting fiduciary standards the Secretary breached his trust obligations. Procedurally, Interior failed to disclose adequately to the Indians their statutory rights to water-carried sewage systems or the limits on congressional funds provided for pretermination services. Substantively, the distribution plan's agreement on water supplies was so vague and uncertain as to breach the trustee's duty of fair dealing. *See* the discussion in *Duncan* v. *Andrus*, *supra; cf. Smith* v. *United States*, Nos. C-74-1016 WTS & C-74-1061 WTS (N.D. Cal. March 29, 1978) (United States breached its trust duty to Hopland Rancheria Indians by failing to provide adequate water supplies); *see generally* RESTATEMENT (SECOND) OF TRUSTS § 170 (1959); 2 A. SCOTT, THE LAW OF TRUSTS § 170 at 1298 (1967) (trustee must disclose

material facts, make fair transactions in dealing with beneficiaries).[9] On the materials before us, there is no doubt that a serious breach of trust occurred.

V.

Damages

Plaintiffs present a wide variety of damage demands outlined in three separate claims. The first, based on the Government failure to supply adequate water and on the termination itself, seeks recovery of $100,000 for each plaintiff for a number of resulting injuries including losses caused by subjection to real property taxes, deprivation of various federal services to Indians, partial destruction of the Pomo culture, and emotional distress and bodily injuries.[10] The sec-

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[9] This is not a complete catalogue of the breaches which may have been committed, but examples of the types of breaches caused by the concededly unauthorized termination. By citing a breach of trust denominated as a duty of fair dealing we are not invoking the "fair and honorable dealing" jurisdiction of the Indian Claims Commission. Rather, we merely illustrate a breach of duty under a statutory trust.

[10] Plaintiffs' petition lists the damages under the first claim as follows:

(a) The integrity of their Rancheria has been destroyed, and much of the Rancheria's lands have falled [sic] into non-Indian ownership;

(b) They, and other Indians of Robinson Rancheria, have been subjected to land taxation;

(c) Their native Pomo culture has been partially destroyed and is now grievously threatened with complete extinction;

(d) They, and other Indians of the Rancheria, have been subjected to regulation by California of home building activities on the Rancheria which are inconsistent with an Indian way of life;

ond claim, predicated on Government failure to provide adequate sanitation facilities, requests $10,000 for each plaintiff based on the following three injuries:

> a) They have been deprived of operable sanitation and waste-disposal facilities for over ten years, have been forced to resort to outdoor privies, and have gone without indoor privies, and have gone without indoor bathing facilities;
>
> b) They have been deprived of indoor plumbing and the opportunity to raise their families in a decent, safe, and sanitary condition;
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> c) They will, in the future, be deprived of such sanitation facilities.

The third claim seeks recovery for Interior' failure to reserve a right-of-way easement to the community woodlot. Damages in the amount of $5,000 for each plaintiff are sought for these deprivations:

> a) They have been deprived of access to their woodlot for over ten years;
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> b) They have been deprived of marketable title to their woodlot for over ten years;
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> c) Their woodlot has been decreased in value and they will be deprived in the future of access to it.

(e) They have been forced to live without adequate water or sanitation facilities for more than ten years;

(f) They have suffered, as a result, grevous [sic] emotional distress and bodily injuries;

(g) They, and their dependents, have been deprived of eligibility for a wide variety of federal services and benefits provided to Indians by the United States because of their status as Indians.

While some of plaintiffs' damage claims clearly fall within types of monetary damages previously considered by this and other courts, other demands are premised on unusual theories (compensation for injury to native culture or for psychological injuries). A survey of recent Indian cases in this court alleging a Government breach of trust reveals that monetary damages have been limited to tangible, direct injuries to property or to direct losses due to denials of required services. In *Klamath & Modoc Tribes* v. *United States*, 174 Ct. Cl. 483 (1966), the Indians sought recovery for reservation property sold by the Government at an allegedly inadequate price.[11] In *Navajo Tribe* v. *United States*, 176 Ct. Cl. 502, 364 F.2d 320 (1966), the court awarded damages on one claim for a Government breach of trust in failure to notify the Indians of an assignment of their lease; damages were calculated based on the then present value of the lease. In *Capoeman* v. *United States*, 194 Ct. Cl. 664, 440 F.2d 1002 (1971), the plaintiffs' breach of trust claims were grounded on allegedly unjustifiable Government costs assessed from sales of timber from Indian property. The same damage claims were also raised in *Quinault Allottee Ass'n* v. *United States*, 202 Ct. Cl. 625, 485 F.2d 1391 (1973), *cert. denied*, 416 U.S. 961 (1974). Plaintiffs had an even more tangible damage claim in *Cheyenne-Arapaho Tribes* v. *United States*, 206 Ct. Cl. 340, 512 F.2d 1390 (1975), alleging the Gov-

[11] Because the case was presented to the court on defendant's motion to dismiss for lack of jurisdiction, the court did not analyze what damages were recoverable. In a subsequent consideration of the same claims, the court found liability as to certain lands only on a fifth amendment taking theory. *Klamath & Modoc Tribes* v. *United States*, 193 Ct. Cl. 670, 436 F.2d 1008, *cert. denied*, 404 U.S. 950 (1971).

ernment as trustee mismanaged specific funds held for the Indians. In a recent case which awarded damages on a breach of trust claim, *Coast Indian Community* v. *United States*, 213 Ct. Cl. 129, 550 F.2d 639 (1977), the court compensated plaintiffs for a sale by the Government of an Indian right-of-way at a grossly inadequate price. The calculation of damages was based on the difference between the fair value of the right-of-way and the actual sale price. Most recently in *Mitchell* v. *United States*, 219 Ct. Cl.—(Jan. 24, 1979), this court remanded for further proceedings breach of trust claims based on a failure to properly manage Indian lands or to invest Indian funds. Nos. 772-71, 773-71, 774-71 & 775-71, slip op. at 2 n.4 (Ct. Cl. Jan. 24, 1979).

Similarly, a review of the Supreme Court's decision in *United States* v. *Mason*, 412 U.S. 391 (1973), and lower federal court cases cited to us reveals no cause in which any court considered damage claims as nebulous and remote as some urged here.[12]

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[12] In *Mason*, although the claims were rejected on the merits, plaintiffs claimed direct damages from allegedly invalid state tax assessments on their land. *See also Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977) (claims based on county zoning regulations of Indian lands; only declaratory and injunctive relief sought); *Manchester Band of Pomo Indians, Inc.* v. *United States*, 363 F. Supp. 1238 (N.D. Cal. 1973) (damages arising from federal mismanagement of Indian trust funds); *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1972) (claims based on Secretary's misallocation of tribal water rights; declaratory relief granted); *Smith* v. *United States*, Nos. C-74-1016 WTS & C-74-1061 (WTS (N.D. Cal. March 29, 1978) (damages granted for state taxation of rancheria trust lands which were prematurely terminated).

This lack of precedent for recovery of monetary damages for consequential personal suffering or injury to the native culture reflects the difficulties which compel rejection of such claims. The doctrine of sovereign immunity, as applied to pecuniary claims in this court, requires the court to find that a statute can be interpreted as "mandating compensation by the Federal Government for the damage sustained." *Eastport S.S. Corp.* v. *United States*, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967) *quoted with approval, United States* v. *Testan*, 424 U.S. 392, 400 (1976). We have found here, as in *Mitchell* v. *United States*, 219 Ct. Cl.—(Jan. 24, 1979), that this statutorily-created trust relationship does mandate certain types of compensation for a breach. However, it does not follow that the congressional scheme mandates compensation for every conceivable form of damages. As discussed *supra*, this and other courts have thus far found congressional allowance for basically two types of standard trust claims—losses due to mismanagement of trust funds, *see Capoeman* v. *United States*, 194 Ct. Cl. 664, 440 F.2d 1002 (1971); *Quinault Allottee Assn.* v. *United States*, 202 Ct. Cl. 625, 485 F.2d 1391 (1973), *cert. denied*, 416 U.S. 961 (1974); *Cheyenne-Arapaho Tribes* v. *United States*, 206 Ct. Cl. 340, 512 F.2d 1390 (1975), or losses due to mismanagement of tangible trust properties, *see Klamath & Modoc Tribes* v. *United States*, 174 Ct. Cl. 483 (1966); *Navajo Tribe* v. *United States*, 176 Ct. Cl. 502, 364 F.2d 320 (1966); *Coast Indian Community* v. *United States*, 213 Ct. Cl. 129, 550 F.2d 639 (1977); *Mitchell* v. *United States*, 219 Ct. Cl.—(Jan. 24, 1979). Direct monetary damage due to improper subjection to state or local taxes, as a result of a federal breach of trust, would also seem to fall squarely within the same

category. *See Smith* v. *United States*, Nos. C-74-1016 WTS and C-74-1061 WTS (N.D. Cal. March 29, 1978); *cf. United States* v. *Mason*, 412 U.S. 391, 398 (1973). So would the value of benefits (*e.g.* health, education, and sanitary benefits) improperly withheld in breach of trust.

As we have indicated, at least two of plaintiffs' bases for claimed damage—injury to Pomo culture and consequential emotional and psychological injuries—go far beyond these types of damage, and we cannot find any express or implied congressional authorization for such a recovery. These demands are very close kin to charges of destruction of Indian peoplehood which even the broad rubrics of the Indian Claims Commission Act did not cover. *See Gila River Pima-Maricopa Indian Community* v. *United States* (Davis, J., concurring), 190 Ct. Cl. 790, 801, 427 F.2d 1194, 1200, *cert. denied*, 400 U.S. 819 (1970). Moreover, such alleged cultural or psychological injuries fall wholly outside of the purview or objectives of the statutory standards which Congress has often established for management of Indian funds or property. *See Mitchell* v. *United States*, Nos. 772-71, 773-71, 774-71, 775-71, slip op. at 9 (Jan. 24, 1979) (statutes cited by plaintiffs can "furnish congressional gauges of proper trustee conduct"); *Manchester Band of Pomo Indians, Inc.* v. *United States*, 363 F.Supp. 1238, 1243 (N.D. Cal. 1973) ("Congress has also been vigilant in setting forth the standards by which Government-managed Indian trust funds must be invested."). Nor do such cultural or emotional losses fall into the category of damages where standards of duty and measures of recovery are provided by traditional trust law doctrines. *Cf. Coast Indian Community* v. *United States*, 213 Ct. Cl. 129, 550 F.2d 639 (1977) (sale of trust property

at unfairly low prices; damages based on difference between fair market value of trust land and actual sales price); *Navajo Tribe* v. *United States*, 176 Ct. Cl. 502, 364 F.2d 320 (1966) (assignment of lease without notice to beneficiary; damages based on market value of lease). In the absence of some indication of congressional authorization and without statutory or common law standards of trustee duty and of compensation, we cannot discover any mandate for allowance of these two alleged consequential losses.[13]

Other of the damage claims we leave open without decision until facts are more fully developed so as to reveal more precisely the circumstances of the asserted injury and the connection, direct or otherwise, between that loss and the Government's breach. In this group are the sale by Robinson Indians of much of the Rancheria's lands to non-Indian owners [14] and the subjection of the Robinson Indians to regulation by California of home-building activities. For

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[13] The practical difficulties of assessing causation and an appropriate quantum of damages for such cultural and emotional injuries said to arise from a breach of trust are also considerable, not to speak of how to determine what was Pomo culture before the breach and what impact the breach had on the then-existing Indian society. The Supreme Court has recently implied, in a case involving judicial inquiry into tribal membership standards, that the federal judiciary might well be wary of entering into such uncharted fields: "Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 72 n.32 (1978).

[14] This undecided category does not include the loss of land through tax sales—damages which we consider to be a recoverable and direct consequence of improper imposition of state or local taxes.

the latter, if plaintiffs can demonstrate that the Government's unlawful termination exposed them to state regulations which directly increased the pecuniary costs of building or maintaining homes on the Rancheria, then recovery should be allowed (but damages should not be awarded because state regulation was "inconsistent with an Indian way of life"). As for alleged physical injuries to plaintiffs or their families due to the breach, we also leave the question of compensability open for fuutre development and decision.

To sum up on damages, on remand to the Trial Division for determination of the extent and amount of Government liability, the trial judge should award: (a) damages directly due to the trustee's proven mismanagement (through misfeasance or nonfeasance) of land or physical property (*e.g.*, alleged failure to provide a right-of-way to the community woodlot), (b) the value of federal services improperly withheld, and (c) damages directly due to the loss of tax immunities during the invalid termination. Claims for injury to Indian culture (or for happenings inconsistent with the "Indian way of life") or for personal or family psychological distress are not recoverable. The other damages claims are left open for later decision (depending in large part on the proof to be made).

VI.

Statute of Limitations

Defendant also contends that, even if this court has jurisdiction over the breach of trust claims, the action is barred by the six-year statute of limitations, 28 U.S.C. § 2501 (1976). The Government's point is that the invalid termination was announced on September 6, 1965, and plaintiffs' petition in this court

bears the date of February 5, 1975, obviously more than six years later. The easiest reply is that plaintiffs had validly filed a claim for damages in the United States District Court (as part of *Duncan* v. *Andrus*, *supra*) on August 19, 1971, within the six-year peroid. After amending the complaint to increase damages above the District Court's $10,000 jurisdictional limit, plaintiffs were granted a transfer to this court under 28 U.S.C. § 1406(c) (1976). The transfer order was received here on January 17, 1975, and plaintiffs simply filed their claim on February 5, 1975, to conform with the rules of this court. *See* CT. CL. R. 181.

The transfer statute clearly mandates that upon transfer the case shall proceed "* * * as if it had been filed in the Court of Claims on the date it was filed in the district court." 28 U.S.C. § 1406(c) (1976). This statute has been liberally construed to lift an otherwise existing statute of limitations bar, and this construction is amply supported in the legislative history. *E.g.*, *Rothman* v. *United States*, No. 363-77 (Ct. Cl. order, Jan. 26, 1979); *see* S. REP. No. 1894, 86th Cong., 2d Sess. 4 (1960) *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 3583, 3585. It is clear therefore that plaintiffs' claims are not barred.

Plaintiffs' motion for partial summary judgment on the issue of liability is granted. Defendant's motion to dismiss for lack of jurisdiction or for failure to meet the statute of limitations is denied. The case is remanded under Rule 131(c) to the Trial Division for determination of the nature and extent of damages in conformity with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Consolidated Actions:

No. C-71-1572 WWS

No. C-71-1713 WWS

MABEL DUNCAN, ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, ET AL, DEFENDANTS

MEMORANDUM OPINION AND ORDER GRANTING JUDGEMENT

INTRODUCTION

Plaintiffs, who are current and former Indian residents of the Robinson Rancheria in Lake County, California, have brought these actions against the Secretary of the Interior, other named federal officers, and the Lake County Tax Collector. Plaintiffs allege in their complaints that the Robinson Rancheria was unlawfully and prematurely terminated under the Act of August 18, 1958, P.L. 85-671, 72 Stat. 619, as amended,[1] thereby depriving them of federal Indian benefits and subjecting them to state and local taxation. They have sought declaratory

[1] P.L. 85-671 will be hereafter cited as the "Rancheria Act." It was amended by the Act of August 11, 1964, P.L. 88-419, 78 Stat. 390. Neither the 1958 Act nor the amendment were codified in Title 25 of the United States Code. The Act and the Amendment are included in Document #64, the Agreed Statement of Facts, as Exhibits #5 and #6 thereto.

and equitable relief rescinding the termination in this Court and monetary relief in the U.S. Court of Claims.[2]

The jurisdiction of this Court is asserted under 28 U.S.C. § 1331; the action arises under the laws of the United States, specifically the California Rancheria Act, 72 Stat. 619, as amended 78 Stat. 390. The parties have stipulated that the amount in controversy, exclusive of costs and interests, exceeds the sum of $10,000 as to each named plaintiff. (Doc. #64, p. 23.) The Court has independently examined this stipulation and has concluded that its estimate of the amount in controversy is reasonable and made in good faith in view of the rights involved in this action. Accordingly, the Court determines that it has jurisdiction of this action under 28 U.S.C. § 1331.[3] *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974); see also *Seber* v. *Board of County Commissioners*, 38 F.Supp. 731 (N.D. Okla. 1941), *aff'd as modified*, 130 F.2d 663 (10th Cir., 1942), *aff'd* 318 U.S. 705 (1943). The Court further determines that it has jurisdiction over the Lake County Tax

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[2] Plaintiffs filed their First Amended Complaint, containing six claims for relief, on December 30, 1974. The first four claims remain pending before this Court. The fifth claim, relating to woodlot access, has been dismissed without prejudice on stipulation of the parties. The sixth claim has been transferred to the Court of Claims pursuant to 28 U.S.C. § 1406(c), and remains pending in that Court.

[3] The $10,000 jurisdictional requirement has been eliminated as to suits against agencies and officers of the United States by amendment to 28 U.S.C. § 1331 by the Act of October 21, 1976, P.L. 94-574, § 2, 90 Stat. 2721. Because the Court has determined that the requisite amount in controversy is present, the question of the retroactivity of this provision need not be explored.

Collector under 28 U.S.C. § 1343(3) and (4) as well as § 1331.

FACTS

The facts are not in dispute and are set forth in an Agreed Statement of Facts submitted by the parties and made a part of the file herein. (Docs. #64, 66). The Court hereby finds as facts for purposes of this opinion those items set forth in Documents #64 and 66. Rule 52(a), Fed.R.Civ.Pro.

Briefly summarized, the facts are: In 1906, C. E. Kelsey, a San Jose attorney, was commissioned by the United States Indian Office to investigate and report on the conditions of California Indians. Kelsey found that Indians had been forced from agriculturally productive lands and were then living on worthless lands in distressing conditions. (Doc. #64, Ex. #3, pp. 3, 12.) He recommended to the Commissioner of Indian Affairs that the government purchase land for individual Indian families in tracts not exceeding ten acres. Kelsey recommended that the land purchased "be of good quality and proper water supply . . . [and be] . . . located in the neighborhoods in which the Indians wish to live." (*Id.* at pp. 23-24.)

Kelsey's report was submitted to Congress through the Commissioner of Indian Affairs and the Secretary of the Interior with a recommendation that his plan for California Indians be adopted. As a result of these actions, the Indian Office Appropriation Act of 1906 appropriated $100,000 and authorized the Bureau of Indian Affairs to:

> "purchase for the use of the Indians of California now residing on reservations which do not contain land suitable for cultivation, and

> for Indians who are not now upon reservations in said State, suitable tracts or parcels of land, water, and water rights in said State . . . as the Secretary of the Interior may deem proper." Act of June 21, 1906, 34 Stat. 325, at 333 (Doc. #64, pp. 10-11).

Parcels of land, called rancherias, were purchased under the 1906 Act and under subsequent acts to implement Kelsey's original scheme. In all, approximately 82 rancherias located primarily in Northern and Central California were purchased for California Indians.[4]

Robinson Rancheria, the subject of this action, was purchased by the United States in 1909 under authorization contained in the Acts of June 21, 1906, and April 30, 1908.[5] It was occupied upon its purchase by a band of California Indians of Pomo stock. It was informally broken up by the band at the outset into unsurveyed parcels which were assigned to family heads as homesites. The Bureau of Indian Affairs apparently knew of and acquiesced in this system of informal allottment. Legal title to the land remained in the United States, although it was acknowleged that the United States held in trust for the California Indians. (Doc. 64, p. 12-13.) [6]

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[4] The appropriations for most of these purchases came from the 1914 "Homeless Indian" appropiration and its progency. Act of August 1, 1914, C. 222, § 3, 38 Stat. 582, at 589.

[5] The Act of 1906 may be found at 34 Stat. 325; the Act of 1908 at 35 Stat. 70.

[6] In addition to the Robinson Rancheria proper, which was occupied by the band, a Secretarial Order of 1907 set aside 160 acres as a wood reserve. This tract, known as the Woodlot, is not inhabited.

In the decades following 1944, the usefulness of the Rancheria system was debated in the Executive Branch as well as in Congress. Congressional attitudes during this period reflected a desire rapidly to end Indian dependence on federal services, curtail the Indian services bureaucracy, and assimilate Indians into the mainstream of the United States culture. These objectives were to be accomplished in part by granting legal title to Rancheria land to individual Indians and terminating federal benefits and services to such Indians.

Authority for termination of federal supervision over, and distribution of the assets of Robinson-Rancheria was provided by Congress in 1958. P.L. 85-671, 72 Stat. 619.[7] Section 1 of the Act provides that the assets of 41 named Rancherias (including Robinson Rancheria) "shall be distributed in accordance with the provisions of this Act," Section 2(a) requires that a plan be prepared by the Indians of each Rancheria or by the Secretary of the Interior after consultation with the Indians. But Section 2 (b) manifests the clearly *permissive* character of any execution of the plan, mandating that the plan be carried out only if approved by a majority of the Indians voting in a referendum.

Section 3(c) of the Rancheria Act, the section critical to this action, requires the Secretary to undertake certain action with respect to Rancheria water systems before conveying the land outright to the Indians. That section provides:

> "Before making the conveyances authorized by this Act on any rancheria or reservation, the

[7] The 1958 Act was amended by the Act of August 11, 1964, P.L. 88-419, 78 Stat. 390.

Secretary of the Interior *is directed*: . . .

(c) to install or rehabilitate such irrigation or domestic water systems *as he and the Indians affected agree*, within a reasonable time, should be completed by the United States." (Emphasis added.)

Acting under authority conferred upon the Secretary by Section 2(a) of the 1958 Act, the Bureau of Indian Affairs met with the Indians of the Robinson Rancheria and developed a tentative plan for the distribution of the Rancheria's assets. Preliminary approval was given to the plan by the Commissioner of Indian Affairs and a "general notice" of the plan was given to proposed Indian distributees pursuant to an implementing federal regulation, 25 C.F.R. § 242.4. After a 30 day appeal period had expired, the plan was finally approved and submitted to a referendum vote of the distributees. The plan as submitted was accepted by a vote of 24 "yes" and 1 "no" and became effective on March 10, 1960.

As approved and accepted, the Distribution Plan called for conveyance of the Rancheria's lands to 28 named Indian distributees. The plan also provided that certain Rancheria lands (including a church lot, woodlot, cemetery, and three small well lots) would be conveyed to a "legal entity" to be held for communal purposes. Deeds were subsequently issued to distributees and recorded. A deed to the communal areas was issued to the Robinson Pomo Association, an unincorporated association formed through the efforts of the Bureau and subscribed to by Indian distributees, and recorded. The assets of Robinson Rancheria were distributed in this fashion between 1961 and 1963. *Significantly, the plan made*

no provision regarding general water, sanitary, or irrigation systems on the Rancheria.

On August 11, 1964, before the Secretary had published an official notice of termination of the Robinson Rancheria in the Federal Register, Congress amended the 1958 Act. Included in the amendment was a revised Section 3(c) which provided as follows:

> "Before making the conveyances authorized by this Act on any rancheria or reservation, the Secretary of the Interior *is directed*: * * * (c) to construct, improve, install, extend, or otherwise provide, by contract or otherwise, sanitation facilities (including domestic and community water supplies and facilities, drainage facilities, and sewage- and waste-disposal facilities, together with necessary appurtenances and fixtures) and irrigation facilities for Indian homes, communities and lands, as he and the Indians agree, within a reasonable time, should be provided by the United States: *Provided*, That with respect to sanitation facilities, as hereinbefore described, the functions specified in this paragraph, including agreements with Indians with respect to such facilities, shall be performed by the Secretary of Health, Education, and Welfare in accordance with the provisions of section 7 of the Act of August 4, 1954 (58 Stat. 674), as amended (42 U.S.C. § 2004a)."

On September 3, 1965, the Secretary published official notice of the termination of Robinson Rancheria in the Federal Register, 30 F.R. 11330. Publication of such a notice constitutes the Secretary's finding that all duties under the Rancheria Act had been

performed and that Indian distributees and their families were "terminated", i.e. no longer eligible for federal benefits provided to Indians.[8]

The Agreed Statement of Facts includes a description of the water and sanitation facilities on the Rancheria before, during, and after termination. (Doc. #64, pp. 19-32.) The statement establishes that: (1) there is no adequate irrigation for home gardens on the Rancheria; (2) the Rancheria has never had an adequate water system for domestic uses; shallow wells provide intermittent quality and quantity of water; (3) the inadequate water system has resulted in problems with sanitary waste disposal. Following enactment of the 1964 amendments to the Rancheria Act, no agreements were made between Robinson Rancheria Indians and the Secretaries of the Interior and/or Health, Education, and Welfare regarding the installation or upgrading of a domestic water system for the Robinson Rancheria.

Since the assets of the Rancheria were distributed in 1961, approximately 77% of its usable acreage (not including roadways) has passed into non-Indian ownership, and at least six new, non-Indian homes have been constructed thereon. Some of these homes

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[8] The 1959 Regulations (24 F.R. 4652, § 242.10) provide:

> "When the provisions of a [distribution] plan have been carried out to the satisfaction of the Secretary, he shall publish in the FEDERAL REGISTER a proclamation declaring that the special relationship of the United States to the rancheria or reservation and to the distributees and the dependent members of their immediate families is terminated. The proclamation shall list the names of the distributees and dependent members of their immediate families who are no longer entitled to any services performed by the United States for Indians because of their status as Indian."

have developed their own wells. (Doc. #24, p. 27.) Plaintiffs in this action consist of named Indian distributees, members of their families, and their Indian transferees, some of whom remain on the Rancheria and some of whom have sold all or part of their land to third parties.

Was the Termination of Robinson Rancheria Authorized by the California Rancheria Act of 1958?

The essence of plaintiffs' argument in this action is that the termination of Robinson Rancheria was not authorized by the Act of 1958 because the Secretary failed to provide adequate water facilities before conveying the land to individual distributees. Defendants, through counsel, have conceded that the termination was unauthorized. (Defendant's Brief in Response, Doc. #77.) Since interpretation of the 1958 Act is essential to the proper disposition of this action in all respects, the Court will not rely on the concessions of the parties, but will examine independently the duties of the Secretary and the rights of Indian distributees under the Act.

Section 3(c) of the 1958 Act *directed* the Secretary to install or rehabilitate water systems *before* conveying Rancheria land to Indian distributees. The 1964 amendment to the section retains the same mandatory structure, with two elaborations: (1) it made more specific the means of fulfilling the Secretary's obligation and the scope of the facilities covered; and (2) it added an obligation on the part of the Secretary of Health, Education, and Welfare with respect to sanitation facilities, including domestic water systems.

Both versions of Section 3(c) and the surrounding provisions of the Rancheria Act support the

inference that Congress intended some sort of action by the Secretary regarding water facilities to be a *condition precedent* to termination. Nothing in the surrounding provisions or in the legislative history of the Act contradicts this inference. The exact nature of the action required by the Secretary, however, present a more difficult problem. The section requires performance of such construction, installation, etc., as the Secretary and the Indians "*agree*, within a resonable time, should be provided by the United States." The mandate of this section could be regarded as no more than a dictation of terms by the Secretary. Under this interpretation, a failure of agreement or passage of a reasonable time without agreement would extinguish the Secretary's duties and the corresponding rights of the Indians.

But such an interpretation would drain any content from the Rancheria Act and would conflict with established law governing the interpretation of legislation for the benefit of Indians. As the Supreme Court recognized in passing in *Northern Cheyenne Tribe* v. *Hollowbreast*, 96 S.Ct. 1793, 1797, n. 7 (1976) "statutes passed for the benefit of the Indians are to be liberally construed, and all doubts are to be resolved in their favor." See also, *Bryan* v. *Itasca County*, 96 S.Ct. 2102 (1976); *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1912); *Worchester* v. *Georgia*, 31 U.S. (6 Pet. 515) 350 (1832). The Court of Appeals for this circuit has also termed the canon of construction favoring Indians "a fundamental postulate," *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 660 (9th Cir. 1975), and explained its significance as follows:

> "This principle is somewhat more than a canon of construction akin to a Latin maxim, easily

> invoked and as easily disregarded. It is an interpretive device, early framed by John Marshall's legal conscience for ensuring the discharge of the nation's obligation to the conquered Indian tribes. The federal government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a *trust status toward the Indian—a status accompanied by fiduciary obligations.* [Citations omitted.] While there is legally nothing to prevent Congress from disregarding its trust obligations and abrogating treaties or passing laws inimical to the Indians' welfare, the Courts, by interpreting ambiguous statutes in favor of Indians, attribute to Congress an intent to exercise its plenary power in the manner most consistent with the nation's trust obligations." 532 F.2d at 660 (emphasis added).[9]

The above quoted language applies with particular force to the statutory scheme involved in the case at bar. Here, Congress is attempting to end its traditional trust relationship with a group of Indians and to place them on the road to economic self-sufficiency. It was the manifest intent of Congress in enacting the Rancheria Act to grant to Indian distributees economic resources in fee simple that would

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[9] Principles of the law of trusts have been used to determine the nature and scope of federal obligations to the Indians. *Coast Indian Community* v. *United States*, No. 850-71 (U.S. Ct. Cl., February 23, 1977). The relationship of the federal government and the Indians has also been characterized as "that of a ward to his guardian." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). See also *Gladys Stray Calf* v. *Scott Land and Livestock Co., et al.*, No. 75-1946 (C.A. 9, December 30, 1976), p. 5-6 (Wallace, J., dissenting).

enable them to sustain themselves as productive and useful citizens, independent of collateral federal programs and benefits. Obviously, of critical importance in such a transformation is conveyance of livable and agriculturally viable land. And, as recent events in California abundantly illustrate, water is an indispensable incident of such land.

The above considerations demand that Section 3 (c) be construed to require more than mere agreement or failure to agree within a certain time to discharge the Secretary's obligation. The Secretary must come to the bargaining table as a fiduciary or trustee of the Indians. He must ensure that genuine, good faith bargaining is undertaken by two sides which are fully and competently represented. He must be ready, willing, and able to consider the reasonable needs of the Indians and their land. Finally, and most critically, the Secretary must bear ultimate responsibility for the fairness of the result, measured according to the purposes of the Act.

Judged according to the principles stated above, the Secretary has fallen far short of his obligations in this case. The Indians of the Robinson Rancheria were not represented by counsel in negotiating and approving the termination agreement. There is no evidence that the Secretary ever evaluated or considered the water system; the system today is inadequate. The Secretary has ensured neither fairness of procedure nor fairness of result in the Robinson Rancheria water system; therefore, equitable relief is appropriate.

Scope of Appropriate Relief.

At the Court's request, both parties submitted proposed forms of judgment and decree and briefed the issues of relief. The proposed forms and briefs do

not reveal any irreconcilable differences regarding the scope of relief. Both parties agree on the fundamental issue—Robinson Rancheria must be "unterminated" and its distributees and their families must be given the opportunity to regain federal benefits lost through termination. Several additional considerations have moved the Court toward the particular form of judgment adopted; these will be briefly discussed to account for the Court's particular exercise of equitable discretion in this case.

First, the Indian distributees are entitled to prompt relief restoring their federal benefits, but respecting the vested rights in the Rancheria land which they have acquired through the operation of federal regulations. See, 25 C.F.R. § 242.7 (1960); 24 F.R. 4652-4654 (June 9, 1959). This will be accomplished through a declaration that the termination of Robinson Rancheria is void and an order directing the Secretary of the Interior to rescind the notice of termination and restore all federal benefits. Appropriate notice to Rancheria Indians of this action will be given.

Second, the rights of third party non-Indian good faith purchasers, who now hold 77% of the residential acreage on the Rancheria, must be protected. These transferees may have taken record title without knowledge of the intricacies of the fiduciary obligations of the Secretary and any resulting ownership defects. This will be accomplished through a declaration that only Indian distributees or their Indian transferees hold under voidable deeds. Only these persons will have the option of reconveying to the government. Those distributees who sold their land will retain their right to pursue monetary remedies in the Court of Claims.

Third, the state tax status of Rancheria land is dealt with in accordance with a Stipulation executed

by the parties and filed with the Court on June 7, 1976. In that stipulation, the Tax Collector of Lake County stated her intention not to appear further in this action and stipulated to a permanent injunction regarding tax action in the event this Court found the Robinson Rancheria termination unlawful. (Doc. #67.)

For the reasons stated above and good cause appearing:

IT IS HEREBY ORDERED that the Clerk of this Court shall enter judgment in this action as hereinafter set forth.

DATED: March 21, 1977.

/s/ William W. Schwarzer
WILLIAM W. SCHWARZER
United States District Judge

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Opposition

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1747

UNITED STATES OF AMERICA,

Petitioner,

v.

MABEL DUNCAN, et al.,

Respondents,

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTION PRESENTED

Respondents contend that the Petition fairly presents only the following question:

In a case in which the United States has been determined by a final and unappealed judgment of a court of competent jurisdiction to have breached statutorily-created fiduciary obligations to the Indians of the Robinson Rancheria, may the Indians of the Robinson Rancheria sue the United States under the Tucker Act, 28 U.S.C. §1491, for damages proximately caused by its breaches of fiduciary duties in implementing the California Rancheria Act?

Petitioner purports to present the question of whether, assuming the United States is liable for breach of its trust duties to the Indians of the Robinson Rancheria, its liability extends to damages not proximately caused by breach of trust duties. Respondent respectfully submits that unless and until the Court of Claims actually awards damages in this case, it would be purely speculative to suggest an absence of proximate cause,

and thus that presentation of this question is premature.

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STATUTES INVOLVED

1. The California Rancheria Act, P.L. 85-671, 72 Stat. 619-620, August 18, 1958, as amended by P.L. 88-419, 78 Stat. 390, August 11, 1964,

2. 25 C.F.R. Part 242 (1959 and as amended in 1965).

The texts of the original and amended Rancheria Acts, and the original and amended Rancheria Act Regulations, are set forth in the Appendix hereto in parallel form for ease of comparison.

STATEMENT OF THE CASE

This action began in the United States District Court for the Northern District of California on August 19, 1971, when Indians of the Robinson Rancheria in Lake County, California, sued to invalidate the purported termination of the trust status of the lands and Indian status of the people of the Rancheria under the California Rancheria Act of August 18, 1958, P.L. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, P.L. 88-419, 78 Stat. 390, on the ground that said purported termination had not been preceded by fulfillment of federal trust and statutory obligations, and thus was unlawful.

In 1974, the complaint was amended to add plaintiffs and to allege claims for money damages under the Tucker Act, 28 U.S.C. §1491. Because these damages exceeded $10,000, the damage claims were transferred to the Court of Claims pursuant to 28 U.S.C. §1406(c). By stipulation of the parties, the action in the Court of Claims was stayed until the conclusion of the proceedings in the district court.

The case was tried to the district court on the basis of an agreed statement of facts, setting forth the history of the Rancheria and the implementation of the Rancheria Act at the Robinson Rancheria. Based upon the facts as agreed by the parties, the district court issued its decision on March 21, 1977. In that decision, the district court found that the statutes under which the Rancheria had been created, as well as the naming of the Rancheria in the Rancheria Act itself, imposed upon the United States a fiduciary relationship with the Indians of the Rancheria; that the trust relationship between the United States and the Indians of the Rancheria obligated the Secretary of the Interior to fully inform Indians subject to the Rancheria Act of their rights thereunder; that the intent of Congress in enacting the Rancheria Act required that the Act be interpreted as entitling Indians electing to terminate thereunder to receive benefits, improvements and services adequate to meet their reasonable needs; that the Secretary of the Interior had a fiduciary duty to ensure

that the plan for the distribution of the Rancheria's assets adequately provided for the reasonable needs of the Rancheria's distributees; and that the Robinson Rancheria distribution plan, as approved and as implemented, utterly failed to provide the distributees with the improvements, benefits and services to which they were entitled under the Rancheria Act. Duncan v. Andrus, 517 F. Supp. 1 (N.D. Calif., 1977).

Based upon these findings, the district court restored the status of the Indians of the Robinson Rancheria as Indians under the laws of the United States, and authorized Indian landowners on the Rancheria to reconvey their lands to the United States to be held in trust for them. id. The United States did not appeal from this judgment.

Respondent Indians then moved for partial summary judgment in the Court of Claims. Petitioner moved to dismiss on jurisdictional grounds. After finding that the source, existence, extent and breach of the fiduciary duties owed by the United States to the Indians of the Rancheria had been established by the unappealed

judgment of the district court in Duncan v. Andrus, supra, the Court of Claims independently reached the same result, and proceeded to grant partial summary judgment to respondents. Under Duncan I, respondents would have been entitled to recover not only pecuniary losses directly attributable to the premature termination of Rancheria assets, but also the value of federal services denied to them because of the purported loss of their Indian status. Duncan v. United States, 597 F.2d 1337 (Duncan I).

Petitioners sought a writ of certiorari; that writ was granted, and the Court of Claims judgment was vacated and remanded (446 U.S. 903) for further consideration in light of the decision of the Supreme Court in United States v. Mitchell, 445 U.S. 535, rev'g. 591 F.2d 1300 (Mitchell I).

On remand, the Court of Claims held that, unlike the limited trust obligation which U.S. v. Mitchell found had been assumed under the General Allotment Act, 25 U.S.C. §331, et seq., the statutes imposing and defining the trust relationship between the United

States and the Indians of the Robinson Rancheria contained no limitation as to its purpose or scope. Thus, because money damages traditionally are available to redress pecuniary losses proximately caused by breaches of fiduciary obligations, the Court of Claims held that Indians of the Robinson Rancheria have a substantive right to recover such damages in an action cognizable under the Tucker Act, 28 U.S.C. §1491. However, such damages would include only those losses attributable to the termination of the trust status of Rancheria property and the value of such services denial of which would have been compensable by the Court of Claims even if respondents had not been unlawfully terminated. Duncan v. United States, 667 F.2d 36 (1981).

Petitioner seeks Supreme Court review of this decision.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE COURT OF CLAIMS CORRECTLY INTERPRETED AND APPLIED UNITED STATES v. MITCHELL.

In United States v. Mitchell, supra, Indian allottees of the Quinault Reservation sued the United States under the Tucker Act for pecuniary losses which they sustained by reason of B.I.A. mismanagement of timber resources on their allotted lands. The Court of Claims, in Mitchell I, had held that the trust created by the General Allotment Act encompassed the duty to manage timber resources, and thus that the United States would be liable in damages for its failure to manage those resources consistent with its obligations as trustee.

In reversing the decision of the Court of Claims in Mitchell I, the Supreme Court neither rejected nor questioned the well-established principle, articulated in United States v. Mason, 412 U.S. 391, that when the United States serves in a fiduciary capacity to Indians,

> "it is duty bound to exercise great care in administering its trust. . . A trustee is under a duty in administering

> the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property . . . if the trust property is lost or diminished in value, the trustee is not subject to a surcharge unless he failed to exercise the required care and skill."
> [412 U.S. at 398].

Rather, the Court held that the General Allotment Act obligated the United States, "...simply ... to prevent alienation of the land and to ensure that allottees would be immune from state taxation." 445 U.S. at 544. Because management of timber was beyond the scope of this duty, there was no breach of any duty under the General Allotment Act, and thus that Act could not be construed as having created a substantive right to money damages for mismanagement of timber resources.

Thus, United States v. Mitchell is to be read as requiring an Indian seeking to sue the United States under the Tucker Act for money damages for breach of federal trust duties to show that a statutorily-based trust relation-

ship exists between the Indian and the United States; that the trust relationship extends to the particular subject matter upon which the claim for damages is based; that the United States breached its trust obligations; and that the nature of the obligation breached is such that money damages are an appropriate remedy for injuries proximately caused by the breach.

On remand herein, the Court of Claims concluded that a statutorily-based trust relationship exists between the United States and the Indians of the Robinson Rancheria; that the relationship obligated the United States not only to provide the Indians of the Rancheria with accurate information about their rights under the Rancheria Act, but also to ensure that they received adequate facilities, improvements and benefits thereunder; that the United States breached its fiduciary obligations under the Rancheria Act by terminating the Rancheria and its people on the basis of a distribution plan which, as approved and implemented, failed adequately to provide for the reasonable needs of the Indians; that the Indians of the Rancheria have sustained precisely

the sorts of pecuniary losses which continued trust status and Indians would have prevented; and thus that the Indians of the Rancheria may recover money damages under the Tucker Act for their pecuniary losses directly attributable to breaches of federal fiduciary obligations under the Rancheria Act.

In reaching these conclusions, the Court of Claims relied not only upon its own analysis of the facts and the law, but also upon the unappealed final judgment in Duncan v. Andrus, supra. The Court of Claims also relied upon the unappealed final judgment in Smith v. United States, 515 F. Supp. 56 (N.D. Cal., 1978), in which an Indian of the Hopland Rancheria received damages from the United States for the loss of prematurely-distributed Rancheria lands at a tax-collector's sale. Under Blonder-Tongue Labs v. University Foundation, 402 U.S. 313 (1971), and Montana v. United States, 440 U.S. 147 (1979), these final, unappealed district court judgments as to the origin, scope and breach of federal trust duties under the Rancheria Act,

and remedies available therefor, are binding upon the United States.

Having determined that a statutorily-based trust relationship existed, and that the United States had breached its duties thereunder, the Court of Claims was required by U.S. v. Mitchell only to determine whether the statutes creating and defining the scope of federal trust obligations could be fairly interpreted as mandating compensation for the injuries which respondents sustained by reason of the breach thereof (petitioner has abandoned its prior claim that a separate statutory wiaver of sovereign immunity also is required; Petition, p. 17, fn. 15).

As interpreted in Duncan II (and in Duncan v. Andrus, supra), the Rancheria Act expressly provided that Indians subject thereto who chose to accept termination of the trust status of their Rancheria lands and their personal status as Indians (with concomitant and jurisdictional immunities) would receive in return, prior to termination taking effect, water, sanitation and other

improvements necessary to enjoy and utilize their lands, vocational training and educational assistance necessary to successfully function in non-Indian society and, at the end of the process, fee title to their lands. See also, Daniels, et al., v. Andrus, 515 F. Supp. 56 (N.D. Calif., 1978); Hearings on H.R. 2576, H.R. 2824, H.R. 2838, H.R. 6364, House Interior Subcommittee on Indian Affairs, 85th Cong., 1st Sess., ser. 13 (1957).

At the Robinson Rancheria, the burdens of termination were thrust upon respondents without prior provision of necessary improvements, benefits and/or services. As the direct and proximate result of this premature termination, Rancheria lands was taxed and regulated by State and local authorities (rendering some land useless), land was seized in satisfaction of welfare, tax and judgment liens and some lands were sold under duress -- precisely the sorts of losses which trust status would have prevented.

Petitioner would interpret the Rancheria Act as imposing upon the Secretary of the Interior only "a substantive duty... to provide some appropriate level of water and sanitary services for the Robinson Rancheria prior to termination." Such an interpretation ignores the Act's plain language and legislative history, the canon of statutory construction which requires that the Act be construed in the manner most beneficial to the Indian people affected thereby, Bryan v. Itasca County, 426 U.S. 373 (1976), and the unappealed final judgment in Duncan v. Andrus, supra. All of these clearly demonstrate that petitioner's construction of the Act is myopic and erroneous, and that the construction of the Act by the Court of Claims was correct.

The Rancheria Act is replete with specific directives to the Secretary of the Interior to provide Rancheria Indians with guidance, assistance and tangible material benefits, services and improvements. §2(a) of the Act directs the Secretary to consult with the Indians regarding preparation of a distribution

plan, and to assist them in forming a legal entity for the purposes of the Act. In this case the Secretary advised the Indians to accept less than they were entitled to receive, and form an unincorporated association, the status of which as a "legal entity" was questioned by the Secretary's own legal counsel.

Obviously, Congress intended that the Secretary continue to act as a fiduciary in rendering advice to Indians about the Rancheria Act. Such consultation necessarily should have included providing the people of the Robinson Rancheria with information about their rights under the Rancheria Act, and estimation of their needs, a projection of the B.I.A.'s ability to meet those needs with available funds, alternative means of meeting those needs without accepting termination and assistance in forming an entity of unquestionable legal status. The Secretary of the Interior provided no such advice in this case.

§2(b) of the Act provides that after approval of the distribution plan by the Indians who will participate in the distribution, the plan shall be

carried out. §10(a) of the Act provides that upon such approval, the plan shall be final, and "the distribution of assets pursuant to such plan shall not be the basis for any claim against the United States by an Indian who received or is denied a part of the assets distributed." [Emphasis added].

Clearly, the Secretary had a fiduciary duty to distribute Rancheria assets "pursuant to" the distribution plan. By specifically precluding suits for money damages for a distribution of Rancheria assets "pursuant to" a distribution plan, Congress clearly intended that such damages be available in the event that Rancheria assets were distributed other than pursaunt to a valid distribution plan. In this case, the distribution plan was invalid, because of the federal breaches of trust and statutory obligations.

§2(d) of the Act provided that property distributed pursuant to the Act shall at the time of distribution not be subject to federal or state taxes, but thereafter shall be subject to the same taxes as apply to non-Indian property.

In this case, the Secretary distributed Rancheria assets other than "pursuant to" the Act, and thereafter declared the property to be taxable by publishing a termination proclamation in the Federal Register (30 Fed. Reg. 11330), with the result, inter alia, that Lake County assessed and collected real property taxes on Rancheria lands, and the State of California taxed income earned on the Rancheria by Rancheria residents and Rancheria-based sales transactions.

Congress could not have expressed more clearly its intent that Rancheria Indians would not have to pay such taxes unless and until their immunities first had been terminated in strict compliance with the Rancheria Act. Under United States v. Mason, supra, as well as the unappealed final judgment in Smith v. United States, supra -- indeed, under United States v. Mitchell, supra -- money damages for such pecuniary losses clearly are an appropriate remedy.

Fulfillment of the duties which §3 of the Rancheria Act imposed upon the Secretary of the Interior were critical to the implementation of the intent of

Congress that Rancheria Indians electing to terminate receive full value for the surrender of their unique Indian rights and status. §3(a) directed that title to lands distributed be "marketable and recordable." Under Calif. Gov't. Code §66410, title to property without legal access may not be marketable, and thus is less valuable. Since the Secretary, acting as a reasonably prudent fiduciary, could and should have provided for access, the United States clearly is liable in damages for the failure to have done so.

§§3(b) and (c) of the Act mandate that the Secretary of the Interior make specific and adequate improvements to Rancheria roads and water systems before distributing Rancheria assets and subjecting Rancheria property and persons to State and local taxation and regulation.

The failure to provide these essential improvements rendered the lands substantially useless to the Indians who lacked independent means by which to improve their lands, and thus vastly accelerated the pace at which Rancheria lands were lost through foreclosure or sale under duress. Thus, it is reasonable

to interpret the Rancheria Act as imposing upon the United States liability at the very least for the difference in value between the property as distributed, and the property in the condition actually received, as well as for the subsequent loss of such property.

§3(e) authorizes the Secretary of the Interior, with the agreement of the affected Indians, to exchange Rancheria lands for non-Indian lands "of approximately equal value." Had the Secretary exchanged Indian lands for lands of significantly less value, this would have been a clear breach of trust, and would render the United States liable in damages, even under United States v. Mitchell.

§8 of the Act directs the Secretary to protect the rights of Indians who are minors, non compos mentis or in need of assistance in conducting their affairs, by causing the appointment of guardians or such other adequate means, without application from such Indians. This section manifests the intent of Congress that the Secretary act as trustee to protect distributees from the improvident

loss of their property. To impute to Congress an intent to preclude the remedy of money damages for breach of this traditional trust obligation is to impute to Congress the intent to render this section virtually meaningless.

Based upon the foregoing analysis of the Rancheria Act in the context of the trust relationship between the United States and the Indians of the Robinson Rancheria, it is clear that the Court of Claims correctly concluded that respondents have met the burdens established by United States v. Mitchell, and thus that their motion for partial summary judgment properly was granted.

II. THE DECISION OF THE COURT OF CLAIMS PERMITS RECOVERY OF ONLY THOSE DAMAGES PROXIMATELY CAUSED BY BREACH OF TRUST AND BREACH OF STATUTE.

The Court of Claims would permit recovery of damages for pecuniary losses proximately caused by unlawful termination. Petitioner would limit damages to pecuniary losses attributable solely to the failure to provide adequate water and sewer facilities. Petitioner's position ignores the entire purpose of the Rancheria Act, and thus lacks any merit.

If Congress had intended that termination be automatic or mandatory (as suggested at p. 24 of the Petition), or that Rancheria Indians merely should receive water and sanitation facilities, the Rancheria Act as written would have been unnecessary. Congress could have enacted a statute terminating named Rancherias outright, without providing any opportunity for assent by the Indians affected, and without providing for any services or improvements (Indians with vested property rights, of course, would

have to be compensated. Choate v. Trapp, 224 U.S. 665 (1912). Congress provided for installation of water and sanitation facilities separately in 42 U.S.C. §2004.

Instead, Congress enacted the Rancheria Act in order to terminate the trust status of the lands and the Indian status of the people of those Rancherias choosing to exchange their special Indian rights and status for the certain provision of the improvements, benefits and services which they desperately needed. Throughout the Rancheria Act, Congress was careful to condition termination on the prior fulfillment of specific trust and statutory obligations.

While the Secretary's failure to provide adequate advice, water and sanitation facilities and marketable and recordable title all constituted breaches of federal trust and statutory duties, the Court of Claims correctly found that the improper termination of the Rancheria (i.e., termination without fulfillment of specific obligations imposed by the Rancheria Act) was the "most significant" (667 F.2d at 47) breach of trust upon which respondents' damage claims are based.

But for the Secretary's premature conveyance of Rancheria assets and publication of a termination proclamation in the Federal Register, respondents and their property would not have been subjected to State and County taxation and regulation, and their property would have been safe from creditors and other claimants. Had access to the Rancheria's woodlot been provided, the value of that land would not have been impaired, and respondents would have been able to utilize it.

The decision of the Court of Claims states that in determining whether a particular claim for damages will be allowed, "The test should always be that of proximate causation by a proven breach of trust." [667 F.2d 49]. There is no reason to expect that the Court of Claims will not rigorously apply this test.

Rather than constituting a "dramatic expansion of the government's liability in damages[,]" as suggested by petitioner, the decision of the Court of Claims is consistent with the body of judicial precedent acknowledged in United States v. Mason, supra, which supports

the proposition that when the United States acts as the trustee for Indian property, the United States will be liable in damages for its breaches of fiduciary duties in the same circumstances as would be a private trustee.

Having created the problems which gave rise to this action, petitioner cannot now be heard to complain of the possible cost of a just resolution of that problem.

CONCLUSION

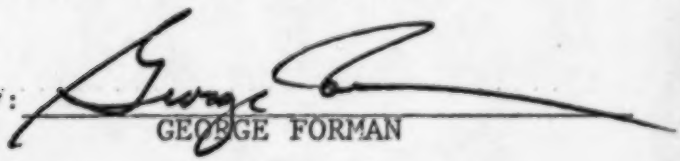
The petition for a writ of certiorari should be denied.

Dated: May 5, 1982

Respectfully submitted,

George Forman
David Rapport
Lester Marston
Bruce J. Friedman
CALIFORNIA INDIAN LEGAL SERVICES
James F. King, Jr., of Counsel

Attorneys for Respondents

By: 
GEORGE FORMAN

Appendix A

CALIFORNIA RANCHERIA ACT.

Act of August 18, 1958,
. 85-671, 72 Stat. 619-62].

1958 Act

AN ACT

provide for the distribution
the land and assets of certain
ian rancherias and reservations
California, and for other
poses.

Be it enacted by the Senate
House of Representatives of
United States of America in
gress assembled, That the lands,
luding minerals, water rights,
improvements located on the
ds, and other assets of the
lowing rancherias and reserva-
ns in the State of California
ll be distributed in accor-
ce with the provisions of
s Act: Alexander Valley, Auburn
Sandy, Big Valley, Blue Lake,
na Vista, Cache Creek, Chicken
ch, Chico, Cloverdale, Cold
rings, Elk Valley, Guidiville,
ton, Greenville, Hopland,
ian Ranch, Lytton, Mark West,
dletown, Nevada City, North Fork,
kenta, Picayune, Pinoleville,
ter Valley, Quartz Valley,
ding, Redwood Valley, Robinson,
nerville, Ruffeys, Scotts
lley, Smith River, Strawberry
lley, Table Bluff, Table
ntain, Upper Lake, Wilton.

The 1958 Rancheria Act, as amended by the Act of August 11, 1964, P.L. 88-419, 78 Stat. 390-391.

Amended [1964] Act

AN ACT

To amend the Act entitled "an Act to provide for the distribution of the land and assets of certain Indian rancherias and reservations in California, and for other purposes", approved August 18, 1958 (72 Stat. 615).

§1

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That the lands, including minerals, water rights and improvements located on the lands, and other assets of the following rancherias and reservations lying wholly within in the State of California shall be distributed in accordance with the provisions of this Act:

when such distribution is requested by a majority vote of the adult members of a rancheria or reservation or of the adult Indians who hold formal or informal assignments on the rancheria or reservation, as determined by the Secretary of the Interior. The requirement for a majority vote shall not apply to the rancherias and reservations that were at any time named in this section.

§2(a) The Indians who hold formal or informal assignments on each reservation or rancheria, or the Indians of such reservation or rancheria, or the Secretary of the Interior after consultation with such Indians, shall prepare a plan for distributing to individual Indians the assets of the reservation or rancheria, including the assigned and the unassigned lands, or for selling such assets and distributing the proceeds of sale, or for conveying such assets to a corporation or other legal entity organized or designated by the group, or for conveying such assets to the group as tenants in common. The Secretary shall provide such assisntance as is necessary to organize a corporation or other legal entity for the purposes of this Act.

§2(a)

When the Indians of a ranch
or reservation request a di
bution of assets in accorda
with the provisions of this
Act, they, or the Secretary
the Interior after consulta
with them shall prepare a p
for distributing to individ
Indians the assets of the r
vation or rancheria, includ
the assigned and the unassi
lands, or for selling such
assets and distributing the
proceeds of sale, or for co
veying such assets to a cor
tion or other legal entity
organized or designated by
group, or for conveying suc
assets to the group as tena
common; Provided, That the
visions of this section wit
respect to a request for di
bution of assets shall not
in any case in which the re
quirement for such request
waived by section 1 of this
and in any such case the pl
shall be prepared as though
quest therefor had been mad
The Secretary shall provide
assistance to the Indians a
necessary to organize a cor
tion or other legal entity
the purposes of this Act.

General notice shall be given
the contents of a plan prepared
suant to subsection (a) of this
tion and approved by the Secre-
f, and any Indian who feels
t he is unfairly treated in the
posed distribution of the
perty shall be given an oppor-
ity to present his views and
ments for consideration of the
retary. After such consideration,
plan or revision thereof shall
ubmitted for the approval of
adult Indians who will partici-
in the distribution of the
perty, and if the plan is approved
majority of such Indians who
in a referendum called for
purpose by the Secretary the
shall be carried out. It is
intention of Congress that such
shall be completed not more
three years after it is approved.

c) Any grantee under the pro-
ions of this section shall
ive an unrestricted title to
property conveyed, and the
eyance shall be recorded in
appropriate county office.

d) No property distributed under
provisions of this Act shall at
time of distribution be subject
ny Federal or State income tax.
owing any distribution of
perty made under the provisions
his Act, such property and any
me derived therefrom by the
ributee shall be subject to the
taxes, State and Federal, as
he case of non-Indians: Provi-
That for the purpose of
tal gains or losses the base
e of the property shall be the
e of the property when distribu-
to the individual, corporation,
ther legal entity.

§2(b) [This section remains the same, except for the langu added below.]

plan shall be carried out; Pro vided, That the provisions of such plan may be modified with the approval of the Secretary consent of the majority of the distributees. It is the inter of Congress that such plan sh be completed not more than th years after it is approved.

§2(c) [Unchanged]

§2(d) [Unchanged]

§3 Before making the conveyances authorized by this Act on any rancheria or reservation, the Secretary of the Interior is directed:

§3(a) To cause surveys to be made of the exterior or interior boundaries of the lands to the extent that such surveys are necessary or appropriate for the conveyances of marketable and recordable titles to the lands.

§3(b) To complete any construction or improvement required to bring Indian Bureau roads serving the rancherias or reservations up to adequate standards comparable to standards for similar roads of the State or subdivision thereof. The Secretary is authorized to contract with the State of California or political subdivision thereof for the construction or improvement of such roads and to expend under such contracts moneys appropriated by Congress for the Indian road system. When such roads are transferred to the State or local government the Secretary is authorized to convey rights-of-way for such roads, including any improvements thereon.

§3(c) To install or rehabilitate such irrigation or domestic water systems as he and the Indians affected agree, within a reasonable time, should be completed by the United States.

§3 Before making the c
authorized by this Act o
rancheria or reservation
Secretary of the Interio
directed:

§3(a) [Unchanged]

§3(b) [Unchanged]

§3(c) To constr
improve, install, extend
otherwise provide, by co
or otherwise, sanitation
ties (including domestic
community water supplies
facilities, drainage fac
and sewage- and waste-di
facilities, together wit
necessary appurtenances
fixtures) and irrigation
facilities for Indian ho
communities, and lands,
and the Indians agree, w
a reasonable time, shoul
completed by the United
Provided, That with resp
sanitation facilities,
inbefore described, the
specified in this parag
including agreements wi
with respect to such fa
shall be performed by th
Secretary of Health, Edu
and Welfare in accordanc
the provisions of sectio
the Act of August 4, 195
(58 Stat. 674), as amend
(42 U.S.C. 2004a).

(d) To cancel all reimbursable debtedness owing to the United ates on account of unpaid construc- on, operation, and maintenance arges for water facilities on the servation or rancheria.

§3(d) [Unchanged]

(e) To exchange any lands within e rancheria or reservation that e held by the United States for e use of Indians which the Secre- ry and the Indians affected agree ould be exchanged before the rmination of the Federal trust for n-Indian lands and improvements approximately equal value.

§3(e) To exchange any lands within the rancheria or reserv tion that are held by the Unit States for the use of Indians which the Secretary and the Indians affected agree should be exchanged before the termination of the Federal trust for non-Indian lands and impro ments of approximately equal value. [The 1964 amendment strikes the word "non-Indian].

Nothing in this Act shall abro- te any water right that exists by rtue of the laws of the United ates. To the extent that the ws of the State of California are t now applicable to any water ght appurtenant to any lands in- lved herein they shall continue to inapplicable while the water right in Indian ownership for a period t to exceed fifteen years after e conveyance pursuant to this Act an unrestricted title thereto, d thereafter the applicability of ch laws shall be without prejudice the priority of any such right t theretofore based upon State law. ring the time such State law is t applicable the Attorney General all represent the Indian owner in l legal proceedings, including oceedings before administrative dies, involving such water right, d in any necessary affirmative tion to prevent adverse appropria- ion of water which would encroach on the Indian water right.

§4 [Unchanged]

§5(a) The secretary of the Interior is authorized to convey without consideration to Indians who receive conveyances of land pursuant to this Act, or to a corporation or other legal entity organized by such Indians, or to a public or nonprofit body, any federally owned property on the reservations or rancherias subject to this Act that is not needed for the administration of Indian affairs in California.

§5(b) For the purposes of this Act, the assets of the Upper Lake Rancheria and the Robinson Rancheria shall include the one-hundred-and-sixty-acre tract set aside as a wood reserve for the Upper Lake Indians by secretarial order dated February 15, 1907.

§5(c) The Secretary of the Interior is authorized to sell the five hundred and sixty acres of land, more or less, which were withdrawn from entry, sale, or other disposition, and set aside for the Indians of Indian Ranch, Inyo County, California, by the Act of March 3, 1928. (45 Stat. 162), and to distribute the proceeds of sale among the heirs of George Hanson.

*****

§5(a) [Unchanged]

§5(b) [Unchanged]

§5(c) [Unchanged]

§5(d) [added by 5(g) of 1964 Act]: Any rancheri reservation lying wholly the State of California held by the United State the use of Indians of Ca and that was not occupie January 1, 1964, by Indi under a formal or inform signment shall be sold b Secretary of the Interio proceeds of the sale sha posited in the Treasury United States to the cre the Indians of Californi rancheria or reservation wholly within the State of California that is held by the States for a named tribe, band, or group that was not occu pied on January 1, 1964, may be sold by the Secretary of t Interior and the proceeds shall be deposited to the credit the tribe, band, or group.

The Secretary of the Interior
l disburse to the Indians of the
nerias and reservations that are
ect to this Act all funds of
Indians that are in the custody
ne United States.

Nothing in this Act shall affect
claim filed before the Indian
as Commission, or the right, if
of the Indians subject to this
to share in any judgment recovered
nst the United States on behalf
ne Indians of California.

Before conveying or distributing
erty pursuant to this Act, the
etary of the Interior shall pro-
the rights of individual Indians
are minors, non compos mentis, or
he opinion of the Secretary in
of assistance in conducting their
irs, by causing the appointment
uardians for such Indains in
ts of competent jurisdiction, or
uch other means as he may deem
uate, without application from
Indians, including but not limited
he creation of a trust for such
ans' property with a trustee se-
ed by the Secretary, or the
hase by the Secretary of annuities
such Indians.

Prior to the termination of the
ral trust relationship in accord-
with the provisions of this
the Secretary of the Interior is
orized to undertake, within the
s of available appropriations a special program of education
raining designed to help the Indians to earn a livelihood, to
uct their own affairs, and to assume their responsibilities as
ens without special services because of their status as Indians.
program may include language training, orientation in non-Indian
unity customs and living standards, vocational training and
ed subjects, transportation to the place of training or in-
tion, and subsistence during the course of training or instruction.
he purposes of such program, the Secretary is authorized to
into contracts or agreements with any Federal, State, or local
rnmental agency, corporation, association, or person. Nothing
is section shall preclude any Federal agency from undertaking
other program for the education and training of Indians with
appropriated to it.

§6. [Unchanged]

§7. [Unchanged]

§8. [Unchanged]

§9. [Unchanged]

§10(a). The plan for the distribution of the assets of a rancheria or reservation, when approved by the Secretary and by the Indians in a referendum vote as provided in subsection 2(b) of this Act, shall be final, and the distribution of assets pursuant to such plan shall not be the basis for any claim against the United States by an Indian who received or is denied a part of the asset distributed.

§10(b). After the assets of a rancheria or reservation have been distributed pursuant to this Act, the Indians who receive any part of such assets, and the dependent members of their immediate families, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner as they apply to other citizens or persons within their jurisdiction. Nothing in this Act, however, shall affect the status of such persons as citizens of the United States.

§10(a) [Unchanged

§10(b). After the assets
rancheria or reservation
distributed pursuant to t
the Indians who receive a
of such assets, and the d
members of their immediat
who are not members of an
tribe or band of Indians,
not be entitled to any of
services performed by the
States for Indians becaus
their status as Indians,
strictions and tax exempt
applicable to trust or re
land or interests therein
by them are terminated, a
statutes of the United St
which affect Indians beca
their status as Indians s
be inapplicable to them,
law of the several States
apply to them in the same
as they apply to other ci
or persons within their j
diction. Nothing in this
however, shall affect the
of such persons as citize
the United States. The p
visions of this subsectio
amended, shall apply in t
of a distribution of ass
either before or after th
ment of the subsection.

. The constitution and corporate
rter adopted pursuant to the
of June 18,1934 (48 Stat. 984),
amended, by any rancheria or
ervation subject to this Act
ll be revoked by the Secretary
the Interior when a plan is ap-
ved by a majority of the adult
ians thereof pursuant to sub-
tion 2(b) of this Act.

e 25 U.S.C. §§461-479).

. The Secretary of the Interior
authorized to issue such rules
regulations and to execute or
rove such conveyancing instru-
ts as he deems necessary to
ry ou the provisions of this

. There is authorized to be
ropriated not to exceed $509,235
carry out the provisions of this

§11. The constitution and corporate charter adopted pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended, or any other authority, by any rancheria or reservation subject to this Act shall be revoked by the Secretary of the Interior when a plan is approved by a majority of the adult Indians thereof pursuant to subsection 2(b) of this Act.

§12. [Unchanged].

§13. There is authorized to be appropriated not-to-exceed ~~$509,235~~ such sums as may be necessary to carry out the provisions of this Act.

APPROVED: August 11, 1964.

Appendix B

LIFORNIA TERMINATION REGULATIONS

1959 Regulations.

Source: Federal Register
e 9, 1959 at page 4652 ff.
F.R. 4652-4654.

2.1 Purpose and scope.

The purpose of this part is to provide
icies and procedures governing the
tribution of the assets of the following
ncherias and reservations in the State
California: Alexander Valley, Auburn,
Sandy, Big Valley, Blue Lake, Buena
ta, Cache Creek, Chicken Ranch,
ico, Cloverdale, Cold Springs, Elk
ley, Guidiville, Graton, Greenville,
land, Indian Ranch, Lytton, Mark
st, Middletown, Montgomery Creek,
oretown, Nevada City, North Fork,
kenta, Picayune, Pinoleville, Potter
ley, Quartz Valley, Redding, Redwood
ley, Robinson, Rohnerville, Rufleys,
otts Valley, Smith River, Strawberry
ley, Table Bluff, Table Mountain, Up-
Lake and Wilton.

242.2 Definitions.

As used in this part, terms shall have
meanings set forth in this section.

(a) "Adult Indian" means any Indian
o is an adult under the laws of the
te in which he is domiciled.
(b) "Distributee" means any Indian
o is entitled to receive, under a plan
pared pursuant to section 2 of the Act
August 18, 1958 (72 Stat. 619), any
ets of a rancheria or irreservation.

B. 1965 Regulations.

Source: Federal Register of August 13, 1965, 30 F.R. 10099, et seq. NOTE: the 1965 regulations were held to be void by a three-judge District Court in Kelly v. U.S. Department of the Interior, 339 F. Supp. 1095 (E.D. Cal. 1972).

§242.1 Purpose and scope.

The purpose of this part is to provide policies and procedures governing distribution of the assets of rancherias and reservations lying wholly within the State of California.

§ 242.2 Definitions.

As used in this Part 242, terms shall have the meanings set forth in this section.

(a) "Secretary" means the Secretary of the Interior or his authorized representative.

(b) "Commissioner" means the Commissioner of Indian Affairs.

(c) "Director" means the Area Director, Bureau of Indian Affairs, Sacramento Area Office, Sacramento, Calif., or his authorized representative.

(d) "Adult Indian" means any Indian who is an adult under the laws of the State in which he is domiciled.

(e) "Distributee" means any Indian who is entitled to receive any assets of a rancheria or reservation under a plan prepared and approved pursuant to section 2 of the Act of August 18, 1958 (72 Stat. 619), as amended by the Act of August 11, 1964 (78 Stat. 390).

(c) "Dependent members", as used in the phrase "dependent members of their immediate families", includes all persons for whose support the distributee is legally liable according to the laws of the State of California and who are related by blood or adoption or by marriage, including common law or customary marriage, who are domiciled in the household of the distributee, and who receive more than one-half of their support from such distributee.

(d) "Formal assignment" means any privilege of use and/or occupancy of the real property of a rancheria or reservation which is evidenced by a document in writing.

(e) "Informal assignment" means any privilege or claim of privilege of use and/or occupancy of the real property of a rancheria or reservation, not based on an instrument in writing.

§242.2 (cont.)

(f) "Dependent members," as u
the phrase "dependent members of
immediate families," means all pe
of Indian descent not sharing di
in the distribution of rancheria o
ervation assets who: (1) Are relat
the distributee by blood or adoption
marriage, including common law
dian custom marriage; (2) are dom
in the household of the distributee
are not members of any other ho
hold of Indians; and (4) receive
than one-half of their support from
distributee or for whose support
tributee is legally liable according
laws of the State in which he is dom

(g) "Formal assignment" mean
privilege of use and/or occupancy
real property of a rancheria or re
tion which is evidenced by an instru
in writing.

(h) "Informal assignment" mean
privilege of use and/or occupancy
real property of a rancheria or re
tion, not based on an instrume
writing.

(i) "Organized rancheria or re
tion" means any tribe, band, or
munity of Indians conducting its
pursuant to an organic document
taining membership criteria approv
the Secretary.

(j) "Unorganized rancheria or
vation" means any tribe, band, or
munity of Indians which does not
an organic document containing
bership criteria approved by the
tary.

3 of the 1959 regulations
es to the formulation of
ribution plans for the
nerias specifically named
242.1. It corresponds
242.4 of the 1965 amended
lations.)

§ 242.3 Requests for distribution.

(a) *Unorganized rancheria or reservation.* Upon receipt of a written request from an adult Indian or Indians of an unorganized rancheria or reservation for the distribution of the assets of the rancheria or reservation, the Director shall prepare a list of Indians in the following categories:

(1) Those who have allotments on the rancheria or reservation;

(2) Those who hold formal assignments;

(3) Those who reside on the rancheria or reservation pursuant to an informal assignment;

(4) Those not in the above categories who have resided for a period of at least three consecutive years immediately preceding receipt of the request as provided for in the introductory text of this paragraph, on the rancheria or reservation not set aside for a designated group of Indians.

(5) The dependent members of the immediate families of those Indians in subparagraphs (1), (2), (3), and (4) of this paragraph.

(b) *Organized rancheria or reservation.* Upon a formal request from the official governing body of the rancheria or reservation, the Director shall prepare a list of the members of such organized group in accordance with the criteria set forth in the approved organic document of the group.

(c) *Eligibility to participate.* The adults whose names appear on a list prepared in accordance with paragraph (a) or (b) of this section shall constitute those persons eligible to vote on the issue of whether a distribution plan is to be developed. A list shall not include the name of any person who is a member of any Indian tribe, band, or community other than the one associated with the rancheria or reservation which has requested the distribution program.

(d) When the Director is satisfied that the list is complete, he shall publish it once weekly for 3 successive weeks in a local newspaper. Within 15 days after the date of the last publication of the list, anyone may protest in writing the omission of a name from the list or the inclusion of any name thereon. His written protest together with arguments to sustain it shall be presented to the

§242.3 (cont.

Director who will render his decisi
which shall be final. After all prote
have been heard and have been d
disposed of, the Director shall hold
election on whether the distribution
rancheria or reservation assets shall
made. Except as otherwise provided
section 1 of the Act of August 18, 1
as amended,[1] if a majority of the eli
voters vote for distribution, a distri
tion plan shall be prepared in accorda
with the applicable portions of this
242.

---

[1] Sec. 1 of the Act of August 18, 1958
Stat. 619), as amended makes manda
the distribution of the land and assets o
following rancherias and reservations:
ander Valley, Auburn, Big Sandy, Big Va
Blue Lake, Buena Vista, Cache C
Chicken Ranch, Chico, Cloverdale,
Springs, Elk Valley, Guidiville, Gra
Greenville, Hopland, Indian Ranch, Ly
Mark West, Middletown, Montgomery C
Morgetown, Nevada City, North Fork,
kenta, Picayune, Pinoleville, Potter Va
Quartz Valley, Redding, Redwood Va
Robinson, Rohnerville, Ruffeys, Scotts Va
Smith River, Strawberry Valley, Table
Table Mountain, Upper Lake, Wilton.

§ 242.3 Plan of distribution.

The plan of distribution to be prepared under section 2 of the Rancheria Act shall be in writing and may be prepared by those Indians who hold formal or informal assignments on the rancheria or reservation involved, or by those Indians who have or claim to have some special relationship to the particular rancheria or reservation involved, not shared by Indians in general, or may be prepared by the Secretary of the Interior after consultation with such Indians. Any such plan must be approved by the Secretary before submission to the distributees for approval. Such plan shall provide for a description of the class of persons who shall be entitled to participate in the distribution of the assets and shall identify, by name and last known address, those persons to be distributees under the plan and dependent members of their immediate family.

§ 242.4 Plan of distribution.

(a) The plan of distribution provided for in section 2 of the Act of August 18, 1958, as amended, shall be in writing and may be prepared by:

(1) Those adult Indians whose names appear on the final list as provided for in § 242.3; or

(2) By the governing body in the case of an organized rancheria or reservation; or

(3) By the Secretary of the Interior after consultation with such Indians.

(b) The primary source of distributees shall be those persons whose names appear on the list prepared in accordance with § 242.3. Additional names may be added to the list upon the approval of a majority of the adults included on the original list referred to above: *Provided*, That no new name shall be added without the approval of the individual and of the Director. In the event of a per capita distribution of any rancheria or reservation funds, all persons whose names appear on the final list prepared pursuant to § 242.3, and all persons whose names have been added thereto, shall be entitled to participate. Any distribution plan must be approved by the Secretary before it is submitted to the adult distributees for approval. Such plan shall provide for a description of the assets and shall identify, by name and last known address, those persons to be distributees under the plan and the dependent member of their immediate families: *Provided*, That for the purpose of this section, any person who is a member of any other tribe or band of Indians shall not be considered a dependent member of a distributee's immediate family.

§ 242.4 General notice.

When the Secretary has approved a plan for the distribution of the assets of a rancheria or reservation, a general notice of the contents of such plan shall be given in the following manner:

(a) Service by regular mail, or in person, of a copy of the plan to those who participated in the drafting of the plan, and to the distributees named in the plan.

(b) Service by regular mail, or in person, of a copy of the plan to all other persons who have indicated by a letter addressed to the Area Director that they claim an interest in the assets of the rancheria or reservation involved.

(c) Posting a copy of the plan in a public place on the rancheria or reservation, and in the Post Office serving the rancheria or reservation.

§ 242.5 General notice.

When the Secretary has appro
plan for the distribution of the as
a rancheria or reservation, notice
contents of such plan shall be gi
the following manner:

(a) A copy of the plan shall
livered in person or mailed to th
known address of those who partic
in the drafting of the plan and th
tributees named in the plan.

(b) A copy of the plan shall
livered in person or mailed to th
known address of all other perso
have indicated by a letter addres
the Director that they claim an i
in the assets of the rancheria or
vation involved.

(c) Posting a copy of the pla
public place on the rancheria or
vation and in the post office servi
rancheria or reservation.

(d) Publication of the genera
tents of the plan once weekly fo
successive weeks in one or mor
newspapers.

§ 242.5 Objections to plan.

Any Indian who feels that he is unfairly treated in the proposed distribution of the property of a rancheria or reservation as set forth in a plan prepared and approved under § 242.3 may, within 30 days after the date of the general notice, submit his views and arguments in writing to the Area Director, Bureau of Indian Affairs, P.O. Box 749, Sacramento, California. The Area Director shall act for persons who are minors or non compos mentis if he finds that such persons are unfairly treated in the proposed distribution of the property. Such views and arguments shall be promptly forwarded by the Area Director for consideration by the Secretary.

§ 242.6 Objections to plan.

Any Indian who feels that he
fairly treated in the proposed di
tion of the assets of a rancheria o
vation as set forth in a plan pr
and approved in accordance wi
regulations of this Part 242 may,
thirty (30) days after the date
publication under § 242.5(d), sub
views and arguments in writing
Director. The Director shall act f
sons who are minors or non
mentis if he finds that such pers
unfairly treated in the proposed
bution of the assets. Such vie
arguments shall be promptly for
by the Director for consideration
Secretary.

§ 242.6 Referendum.

After consideration by the Secretary of all views and arguments, the plan or a revision thereof, and a notice of a referendum meeting, shall be sent by registered mail, return receipt requested, to each distributee. Thereafter, the Secretary shall cause a referendum to be held at a general meeting of the distributees, at the time and place set forth in the notice of the meeting. Any adult Indian distributee may indicate his acceptance or rejection of the plan by depositing his ballot in a ballot box at the meeting place or by mailing his ballot to the Area Director, Bureau of Indian Affairs, P.O. Box 749, Sacramento, California, clearly marked on the envelope the rancheria or reservation referendum for which the ballot is being submitted. All ballots which are mailed shall be posted so as to be received at least two days before the date set for the referendum meeting. Ballots received thereafter shall not be accepted. At the close of the meeting all ballots shall be counted; and if the plan is approved by a majority of the adult Indian distributees, it shall be final and shall take effect on the date approved.

§ 242.7 Referendum.

After consideration by the Secretary of all views and arguments, a copy of the plan or a revision thereof and a notice of a referendum meeting shall be sent by certified mail, return receipt requested, to each distributee. Thereafter, the Secretary shall cause a referendum to be held at a general meeting of the distributees, at the time and place set forth in the notice of the meeting. Each adult Indian distributee may indicate acceptance or rejection of the plan by depositing his or her ballot in a ballot box at the meeting place or by mailing his or her ballot to the Director, in which case the envelope shall be clearly marked to identify the rancheria or reservation referendum for which the ballot is being submitted. All ballots which are mailed must be received by the Director at least 2 days before the date set for the referendum meeting. Ballots received thereafter shall not be accepted. At the close of the meeting all ballots shall be counted and if the plan is approved by a majority vote of the adult Indian distributees, it shall be effective on the date approved. Subject to modification as provided in § 242.8 the plan shall thereupon be put into effect and its provisions carried out as expeditiously as possible, including distribution of assets as therein provided.

here are no provisions in he 1959 regulations which orrespond to §242.8 of the 965 regulations.

§ 242.8 Modification of plan.

If after approval by the Secretary and the adult distributees it is determined by an appropriate resolution approved by a majority of the adult distributees that a plan of distribution is not in conformity with the wishes of the proposed distributees or that it contemplates acts or actions determined to be unfeasible and if modification of the plan of distribution is required to correct the circumstances, such resolution shall be submitted to the Secretary for approval. Approval of the resolution by the Secretary shall be final and the plan of distribution shall be considered modified as of the date of such approval.

§ 242.7 Beneficial interest.

Upon approval of a plan or a revision thereof by the Secretary of the Interior, and acceptance by a majority of the adult Indian distributees, the distributees listed in the plan shall be the final list of Indians entitled to participate in the distribution of the assets of the rancheria or reservation and the rights or beneficial interests in the property of each person whose name appears on this list shall constitute vested property which may be inherited or bequeathed but shall not otherwise be subject to alienation or encumbrance before the transfer of title to such property.

§ 242.8 Organized rancheria or reservation.

When a plan for the distribution of the assets of a rancheria or reservation organized under section 16 of the Indian Reorganization Act (25 U.S.C. 476) shall have been approved and adopted at a referendum held for the purpose, the governing body of such constitutional rancheria or reservation shall cause a final financial statement to be prepared, including a certificate that all the obligations and debts of said rancheria or reservation have been liquidated or adjusted and that all the assets have been or are simultaneously therewith conveyed to persons or groups authorized by law to receive them which may include any organization under State law. The constitution of the group shall upon receipt of a satisfactory certificate of completion be revoked by the Secretary.

§ 242.9 Beneficial interest.

Upon approval of a plan, revisi modification thereof by the Secreta acceptance by a majority of the distributees, the distributees listed plan, revision, or modification sh the final list of Indians entitled t ticipate in the distribution of the of the rancheria or reservation, a rights or beneficial interests of eac son whose name appears on this li be inherited or bequeathed, but sh otherwise be subject to assignme lenation or encumbrance befor transfer by the United States of fu title to such assets, except with t proval of the Secretary.

§ 242.10 Organized rancheria or vation.

When a plan for the distribution assets of an organized rancheria ervation has been approved and a at a referendum held for that p the governing body of such ranch reservation shall cause a final fi statement to be prepared including tificate that all obligations and of said rancheria or reservation been liquidated or adjusted and t the assets have been or are simu ously therewith conveyed to perso sociations, corporations, or other authorized by law to receive them. receipt of a satisfactory certifi completion, the organization do and/or charter shall be revoked Secretary.

9 Rancheria or reservation business corporation.

en a plan for the distribution of the of a tribal business corporation ren approved and adopted by a ref- um held for the purpose, the Board rectors, or equivalent, of such Indian rise corporation shall cause a final cial statement to be prepared and ited to the Area Director, includ- certificate that all the obligations debts of said corporation have been ated or adjusted and that all the s of such corporation have been or ultaneously therewith conveyed rsons or corporations authorized by o receive them. The charter of the p shall upon receipt of a satisfactory ficate of completion be revoked by Secretary.

There are no corresponding provisions in the 1965 regulations. §242.9 of the 1959 regulations evidently applies to the revocation of the charters of IRA tribes, and to the winding up of their affairs.

re are no provisions in 1959 regulations which respond to §242.11 of the 5 regulations.

§ 242.11 Sale of unoccupied land.

Sale of any rancheria or reservation by the Secretary pursuant to the authority contained in section 5(d) of the Act of August 18, 1958, as amended, shall be conducted as nearly as practicable in the manner prescribed in that portion of Part 121 of this title which applies to the sale of individually owned trust or restricted land.

§ 242.10 Proclamation.

When the provisions of a plan have been carried out to the satisfaction of the Secretary, he shall publish in the FEDERAL REGISTER a proclamation declaring that the special relationship of the United States to the rancheria or reservation and to the distributees and the dependent members of their immediate families is terminated. The proclamation shall list the names of the distributees and dependent members of their immediate families who are no longer entitled to any services performed by the United States for Indians because of their status as Indians.

[F.R. Doc. 60-4738; Filed, June 8, 1960; 8:46 a.m.]

[There are no provisions in the 1959 regulations which correspond to §242.13 of the 1965 regulations]

When the provisions of a plan ha
been carried out to the satisfaction
the Secretary, he shall publish in
FEDERAL REGISTER a notice declaring t
the special relationship of the Uni
States to the rancheria or reservat
and to the distributees and the depe
ent members of their immediate fami
is terminated. The notice shall list
names of the distributees and the
pendent members of their immedi
families who are no longer entitled
any services performed by the Un
States for Indians because of their st
as Indians, the fact that all restricti
and tax exemptions applicable to t
or restricted land or interests the
owned by them are terminated, the
that all statutes of the United St
which affect Indians because of t
status as Indians shall be inapplic
to them, and that State laws shall a
to them in the same manner as
apply to other citizens.

§ 242.13 Special instructions.

To facilitate the work of the D
the Commissioner may issue spec
structions not inconsistent with th
pose of the regulations in this Pa
and within any authority deleg
him.